TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 634

FREEDOM HUTCHINSON, TRUSTEE, APPELLANT,

vs.

OTIS, WILCOX & COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED MARCH 12, 1906.

(18,862.)

(18,862.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 634.

FREEDOM HUTCHINSON, TRUSTEE, APPELLANT,

vs.

OTIS, WILCOX & COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript of record from the district court of the United States for the district of Massachusetts	1	1
Petition of Otis, Wilcox & Company	1	1
Proof of claim, with Exhibit A—Statement	4	3
Substituted proof of claim of Otis, Wilcox & Company	5	4
Exhibit A—Statement	7	6
Agreed facts	7	6
Opinion of the referee on petition of Otis, Wilcox & Company	15	12
Order of referee on petition of Otis, Wilcox & Company	22	17
Petition of trustee for review	22	17
Petition of Otis, Wilcox & Company for review	23	18
Certificate of referee to judge on claim of Otis, Wilcox & Company	23	18
Opinion of the district court	24	19
Decree, November 4, 1901, on certified question of reference	27	21
Trustee's petition for appeal and assignment of errors	28	22
Amendment to assignment of errors	29	23
Citation on appeal and acknowledgment of service thereof	30	23
Certificate of clerk of district court	30	24

Washington, D. C., April 2, 1903.

	Original.	Print
Opinion of May 22, 1902	33	25
Final decree, May 22, 1902, affirming decree of district court	45	33
Motion by Freedom Hutchinson, trustee, to reopen decree, filed May 29, 1902	46	33
Opinion of September 4, 1902, that appeal of trustee to Supreme Court be denied	47	34
Order of September 4, 1902, denying appeal to Supreme Court	55	39
Memorandum showing omission from this record of petition of appellant for leave to file in the district court a petition for an amendment of agreed facts, and for a rehearing on the same, and the order of the circuit court of appeals thereon	56	39
Order of December 4, 1902, denying motion of appellant to reopen the decree, filed May 29, 1902	56	40
Memorandum showing omission from this record of motions for mandate and for stay of mandate and of postponement of consideration thereof	57	40
Allowance of appeal by Mr. Justice Holmes	57	40
Finding of facts	57	40
Conclusions of law	65	45
Order of February 20, 1903, that finding of facts and conclusions of law by the court be filed as of May 22, 1902	65	46
Citation on appeal and acknowledgment of service thereof	66	46
Certificate of clerk of circuit court of appeals	68	47

a United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

FREEDOM HUTCHINSON, Trustee, Appellant,
v.
OTIS, WILCOX & COMPANY, Creditors, Appellees. } No. 415.

In the matter of Frederick Swift *et al.* (E. C. Hodges & Co.), bankrupts; *Ex parte* Otis, Wilcox & Company.

Appeal from the district court of the United States for the district of Massachusetts from decree (Lowell, J.), November 4, 1901.

Transcript of Record of United States Circuit Court of Appeals for the First Circuit.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

FREEDOM HUTCHINSON, Trustee, Appellant,
v.
OTIS, WILCOX & COMPANY, Creditors, Appellees. } No. 415.

In the matter of Frederick Swift *et al.* (E. C. Hodges & Co.), bankrupts; *Ex parte* Otis, Wilcox & Company.

Transcript of Record of District Court.

(Filed in circuit court of appeals November 19, 1901.)

District Court of the United States, District of Massachusetts.

No. 2745. In Bankruptcy.

In re FREDERICK SWIFT ET AL., Bankrupts; *Ex Parte* OTIS, WILCOX & COMPANY.

Petition of Otis, Wilcox & Company.

(Filed March 9, 1901.)

Petition by Otis, Wilcox & Company, of Chicago, to be admitted as a creditor and to be paid in full out of the proceeds of the seat held by E. C. Hodges & Co. in the New York stock exchange.

Respectfully represent your petitioners, Otis, Wilcox & Company, of Chicago, as follows:—

On December 27, 1899, E. C. Hodges & Company made an assignment to George Dickson for the benefit of their creditors. At
2 that time the bankrupts were indebted to your petitioners in the amount of $4421.66. On that day your petitioners brought

suit in New York against Hodges & Company on said indebtedness, and joined Post & Flagg, of New York city, as garnishees. Your petitioners at about the same time brought a similar suit in Chicago against the bankrupts, and joined Alfred L. Baker & Company, of Chicago, as garnishees.

In April, 1900, E. C. Hodges & Company were adjudicated bankrupts in the United States district court for the district of Massachusetts.

In the schedule of the firm debts of the bankrupts appears in the list of creditors, "Otis, Wilcox & Co., La Salle St., Chicago, Ill.," holding as security, "lien on seat in New York stock exchange in name of E. C. Hodges" for "$4909.94."

Freedom Hutchinson was duly appointed trustee in bankruptcy. In neither of said two suits brought by your petitioners was any defence interposed, nor was said adjudication in bankruptcy pleaded or suggested on the record, though the trustee in bankruptcy was aware of the pendency of said suits. The cases went to judgment against the principal defendants by default. The garnishees were charged, and after said adjudication in bankruptcy executions issued and were levied on the garnishees. Post & Flagg paid over on the execution $4558.57, and A. L. Baker & Company paid over on the execution $293.82, which moneys were transmitted to or applied for account of claim and costs of your petitioners, who thereupon believed that their said claim against Hodges & Company had thus been paid in full.

At the date of said bankruptcy adjudication, E. C. Hodges was the owner of a seat in the New York stock exchange, an unincorporated association, by the rules of which a seat could be transferred only on condition that the proceeds should first be applied to the benefit of creditor members. Your petitioners were also members of the New York stock exchange.

On or about September 12, 1900, the trustee in bankruptcy sold said New York Stock Exchange seat for $39,000, as appears from his account filed October 18, 1900, in the bankruptcy registry. In said account he recited that

3 "As against the proceeds of this seat the claim of McIntyre & Wardwell as proved for $34,685.05 is entitled to be paid in full out of said proceeds by virtue of the lien on said seat on account of stock exchange membership."

Subsequently, by petition filed November 5, 1900, and decree thereunder dated December 7, 1900, the trustee petitioned for leave, and was ordered to pay said claim of McIntyre & Wardwell in full out of said proceeds. Your petitioners forbore at that time to press their right to full payment of their claim out of said proceeds, for the sole reason that they believed that by their garnishee suits above mentioned their claim had been paid in full.

The trustee has now instituted suit in New York city against Post & Flagg to recover from them the moneys which they held for account of the bankrupts at the time of the adjudication in bankruptcy, and the trustee proposes to bring similar suits against said Chicago garnishees, the claim of the trustee being that the adjudication in

bankruptcy dissolved the garnishee attachments, and that said garnishees were thereafter accountable to him as trustee in bankruptcy. The relations between your petitioners and the said garnishees are such that if the garnishees are compelled to account to the trustee in bankruptcy your petitioners will have to indemnify them by refunding to them the moneys paid over by them on said executions.

As the forbearance of your petitioners to press their right to full payment out of said proceeds of the New York Stock Exchange seat was due to a mistake on their part as to their legal rights in the premises,—*i. e.*, to their assumption that by said garnishee proceedings their claim against said bankrupts had been paid in full,—they now pray that they may be admitted as creditors of said estate in the amount of $4421.66, in accordance with the sworn proof of claim appended hereto; and that the trustee may be ordered to pay their said claim in full out of said proceeds of the New York Stock Exchange seat, upon condition that they concurrently procure from said garnishees a proper accounting and payment to the trustee of the moneys for which said garnishees were at the date of the adjudication in bankruptcy accountable to the trustee in bankruptcy, and that the trustee may be ordered thereupon to refrain
4 from the institution or further prosecution of suits against said garnishees.

Respectfully submitted,

OTIS, WILCOX & CO.,
By their attorneys, ROPES, GRAY & GORHAM,
60 *State Street, Boston.*

ROBERT S. GORHAM, *Of Counsel.*

At Chicago, in the northern district of Illinois, on the twenty-fifth day of February, A. D. 1901, came Joseph E. Otis, Jr., of Chicago, in said district, and made oath and says that he is one of the members of the firm of Otis, Wilcox & Company, a copartnership consisting of this affiant, Charles H. Wilcox and Henry W. Buckingham; that the persons against whom a petition for adjudication of bankruptcy has been filed were, at and before the filing of said petition, justly and truly indebted to said Otis, Wilcox & Company in the sum of forty-four hundred and twenty-one dollars and sixty-six cents ($4421.66); that the consideration of said debt is as follows:

Damages due and owing to said Otis, Wilcox & Company because of the failure of E. C. Hodges & Company, bankrupts in the above cause, to deliver to said Otis, Wilcox & Company three hundred and fifty (350) shares of the Planters' Cotton Compress Company, as will more fully appear by a copy of the account between said Otis, Wilcox & Company and E. C. Hodges & Company, hereto attached as "Exhibit A;" that the said Otis, Wilcox & Company claim the right against the trustee in bankruptcy in the above cause to full payment out of the proceeds of the seat in the New York stock exchange, which stood in the name of said E. C. Hodges & Company, which proceeds have been heretofore received by said trustee in bankruptcy; that this affiant, one of the members of the firm of

Otis, Wilcox & Company, as above set out, was, during the years 1899 and 1900, and still is, a member of the New York stock exchange.

JOSEPH E. OTIS, JR.

Subscribed and sworn to before me this twenty-fifth day of February, 1901.

[SEAL.] ERMINIE MILLER,
Notary Public.

5 EXHIBIT A.

JANUARY 9, 1900.

E. C. Hodges & Co. in account with Otis, Wilcox & Co.

1899.			
Nov. 6.	To draft on account	$5,000 00	
Nov. 13.	By 300 shares Planters' Cotton Compress Co. at 35, with commission		$10,537 50
Nov. 13.	By 50 shares Planters' Cotton Compress Co. stock at 34¾, with commission		1,743 75
Dec. 2.	By interest for November		33 97
Dec. 8.	To draft on account	2,000 00	
Dec. 22.	To draft on account	1,500 00	
1900.			
Jan. 4.	To 250 shares Planters' Cotton Compress Co. stock at 22½, with commission and exchange	5,636 88	
Jan. 9.	To 100 shares Planters' Cotton Compress stock at 26	2,600 00	
	By balance		4,421 66
		$16,736 88	$16,736 88
	To balance due	$4,421 66	

Substituted Proof of Claim, Otis, Wilcox & Co.

(Filed November 12, 1901.)

At Chicago, in the northern district of Illinois, on the — day of November, 1901, came Joseph E. Otis, Jr., of Chicago, in said district, and made oath and says:

That he is one of the members of Otis, Wilcox & Company, a copartnership consisting of this affiant, Charles H. Wilcox, and Henry W. Buckingham; that the parties against whom a petition for adjudication in bankruptcy has been filed were, at and before the filing of said petition, and still are, justly and truly indebted to this depo-

nent's said firm in the sum of four thousand four hundred
6 and twenty-one dollars and sixty-six cents ($4421.66); the consideration of said debt is as follows:—

Damages due and owing to said Otis, Wilcox & Company, because of the failure of said bankrupts to deliver to said Otis, Wilcox & Company three hundred and fifty (350) shares of Planters' Cotton Compress Company stock, as will more fully appear by a copy of the account between said Otis, Wilcox & Company and said bankrupts, hereto attached as "Exhibit A."

That no part of said debt has been paid; that there are no set-offs or counter-claims to the same; and that this deponent has not, nor has said firm, nor has any person by their order or to this deponent's knowledge or belief, to their use had or received any manner of security for said debt whatever, except a lien therefor on the seat or membership of E. C. Hodges, one of said bankrupts, in the New York stock exchange. Said seat has been sold and the proceeds applied in part to the payment of other liens, and the balance of the proceeds, to wit, the sum of four thousand and ninety-one dollars and twenty-eight cents ($4091.28), has, as appears from the record in said bankruptcy proceedings, been paid over to the trustee in said bankruptcy proceedings.

Wherefore, said Otis, Wilcox & Company, claim the right to be admitted as creditors of said bankrupts in the amount of four thousand four hundred and twenty-one dollars and sixty-six cents ($4421.66), and that said balance of the proceeds of said seat, to wit, the sum of four thousand and ninety-one dollars and twenty-eight cents ($4091.28), may be paid to them on account of their said claim, and that, for the remainder, they may be admitted to receive dividends from the estate of said bankrupts.

JOSEPH E. OTIS, JR., *Creditor.*

Signed and sworn to before me this ninth day of November, A. D. 1901.

[SEAL.] JOHN J. McDOUGALL,
Notary Public.

This may be filed.

FREEDOM HUTCHINSON, *Trustee.*

7 The foregoing proof is hereby allowed as of November 4, A. D. 1901, as a substitute for the proof annexed to the original petition of Otis, Wilcox & Company.

By order of court, November 12, A. D. 1901.

[SEAL.] F. S. FISKE,
Deputy Clerk.

EXHIBIT A.

E. C. Hodges & Co. in account with Otis, Wilcox & Co.

1899.				
Nov. 6.	To draft on account	$5,000 00		
Nov. 13.	By 300 shares Planters' Cotton Compress Co., at 35, with commission		$10,537	50
Nov. 13.	By 50 shares Planters' Cotton Compress Co. stock at 34¾, with commission		1,743	75
Dec. 2.	By interest for November		33	97
Dec. 8.	To draft on account	2,000 00		
Dec. 22.	To draft on account	1,500 00		
1900.				
Jan. 4.	To 250 shares Planters' Cotton Compress Co. stock at 22½, with commission and exchange	5,636 88		
Jan. 9.	To 100 shares Planters' Cotton Compress stock at 26	2,600 00		
	By balance		4,421	66
		$16,736 88	$16,736	88
	To balance due		$4,421	66

Agreed Facts.

(Filed May 23, 1901.)

On December 27, 1899, E. C. Hodges & Company made a voluntary assignment to George C. Dickson for the benefit of their creditors. At that time said Hodges & Company were indebted to Otis, Wilcox & Company, of Chicago, in the sum of $4421.66, which indebtedness is still unpaid unless it was discharged through
8 the proceedings hereinafter mentioned against Post & Flagg and Alfred L. Baker & Company. Post & Flagg, of New York city, were indebted to said Hodges & Company in the sum of $4558.57, and Alfred L. Baker & Company, of Chicago, were indebted to Hodges & Company slightly in excess of the sum of $700. On said twenty-seventh day of December, said Otis, Wilcox & Company, knowing of said assignment, brought suit in New York against said Hodges & Company, as non-residents on said indebtedness, and by an order of the court obtained a warrant of attachment on all effects and credits of Hodges & Company in the hands of Post & Flagg. Said warrant of attachment was duly served on Post & Flagg. McIntyre & Wardwell, who were creditors of Hodges & Company in the amount of $34,000 and upwards, brought a similar suit in New York against Hodges & Company and made a similar attachment of the funds in the hands of Post & Flagg. The petitioners also at

about the same time brought suit in Chicago against E. C. Hodges & Company on account of the same indebtedness, and joined Alfred L. Baker & Company of Chicago as garnishees. At the date of the attachments in said suits, E. C. Hodges & Company were insolvent and remained so until the time of their adjudication in bankruptcy on the twenty-seventh day of April, 1900. The defendant Hodges & Company duly appeared by attorney in both said suits prior to the filing of the petition in bankruptcy hereinafter mentioned.

On April 6, 1900, a petition in bankruptcy was filed in the United States district court for the district of Massachusetts by two members of the firm of E. C. Hodges & Company, and the firm was thereafter, on the twenty-seventh day of said April, adjudicated bankrupt, and Freedom Hutchinson was duly appointed trustee of the estate of said E. C. Hodges & Company on the twenty-third day of May, 1900.

That, after the appointment of said Hutchinson as such trustee, he wrote Post & Flagg notifying them of his appointment and demanding payment from them of the amount due the estate of E. C. Hodges & Company, and received from Post & Flagg in answer to said notice and demand a letter dated May 29, 1900, of which the following is a true copy:

9

NEW YORK, *May* 29, 1900.

Replying to your favor of the 28th inst., enclosing copy of your appointment as trustee in bankruptcy of the estate of E. C. Hodges & Company, and requesting us to forward you check for the amount due by us to that firm, according to our last statement, we beg to say that the amount mentioned in your letter is a correct statement of what we owe to the said firm of E. C. Hodges & Company, but the same has been attached in two suits brought in the supreme court of the State of New York, one by the members of the firm of McIntyre & Wardwell, to recover the sum of $32,436.64, with interest from December 28, 1899; in which suit an attachment was served upon us on or about the twenty-eighth day of December, 1899; the other, in a suit brought by Joseph E. Otis, Jr., and Charles H. Wilcox, to recover the sum of $4312.50, in which suit a warrant of attachment was levied upon us on or about the same day, viz.,—December 28, 1899. The proceedings in these actions are, we believe, still pending undetermined; at all events, the attachments against the funds in our hands have never been released and we are therefore unable to comply with your request.

Very truly yours,

POST & FLAGG,
By H. T. HAND, *Att'y*.

The trustee also notified Alfred L. Baker & Company of his appointment as trustee, and demanded payment of the amount due from them to the estate of said Hodges & Company, and received in answer to his notice and demand a letter dated June 4, 1900, of which the following is a true copy:

CHICAGO, *June* 4, 1900.

Your favor received. In reply thereto, we desire to inform you that a notice from Otis, Wilcox & Co. was served on us, that they

had a claim against the bankrupt referred to in your letter, which ties up whatever is due from us until the claim is settled.

Yours truly, ALFRED L. BAKER & CO.

The trustee did not intervene in either of said suits. In neither suit was any defence interposed nor was said adjudication in bankruptcy pleaded or suggested on the record. The cases went to judgment against the principal defendants by default, and executions were issued thereon.

10 That Post & Flagg, although notified prior to the judgment in said New York suit against said Hodges & Company of their bankruptcy and the claim of the trustee to the funds in the hands of said Post & Flagg, on demand from the sheriff paid over to the sheriff on the execution the sum of $4558.57 as and for the effects and credits of the principal defendants in their hands and covered by said warrant of attachment. Said payment was made on the nineteenth day of June, 1900. That soon thereafter A. L. Baker & Company, similarly informed, and allowing themselves to be charged as garnishees by default in the Chicago court, paid over on execution duly issued on the judgment against said Hodges & Company the sum of $293.82, which money paid by Post & Flagg and A. L. Baker & Company was transmitted to Otis, Wilcox & Company, who received it in the belief that it had been duly recovered under valid attachments and that there had thus been effected a full settlement of the judgment rendered on the account of Otis, Wilcox & Company, against said Hodges & Company, an itemized statement of which account is annexed to the proof attached to the petition of Otis, Wilcox & Company, in this case.

And Otis, Wilcox & Company, received the same knowing of the pendency of the bankruptcy proceedings of Hodges & Company, and the claim of the trustee that Post & Flagg were liable to pay said debt to him.

That the court records in said New York and Chicago suits taken together show a judgment issued on the account annexed to the petitioner's proof of claim, and that the same is fully paid and satisfied of record, and that such payment and satisfaction resulted solely from said $4558.57 paid on execution by Post & Flagg, and said $293.82 paid on execution by A. L. Baker & Company, as aforesaid.

Before said payments were made by Post & Flagg and A. L. Baker & Company, Otis, Wilcox & Company, had agreed with them to save them harmless from any liability to any other party for said money so paid or any part of it.

That prior to said adjudication in bankruptcy E. C. Hodges was a member of the New York stock exchange, an unincorporated association, whose rules regulating the transfer of membership provide as follows:

11 Constitution, Article XIII, sect. 6.

All contracts, debts or obligations of every description, with, or to, members of the exchange, of a member who agrees to transfer his membership, shall become due and payable when notice of said

agreement to transfer is posted upon the bulletin of the exchange, and shall be liquidated, and paid, as allowed by the committee on admissions, out of the proceeds of said membership, upon consummation of the transfer thereof. This law shall also apply in every case where a membership is transferred by the committee on admissions.

Constitution, Article XIV, sect. 6.

Any creditor failing to file with the secretary of the committee on admissions a written statement of his claim against a member, prior to the transfer of membership of such member, shall forfeit all right to a share of the proceeds of such membership until all claims filed prior to such transfer have been paid in full.

Otis, Wilcox & Company, and McIntyre & Wardwell were members of said exchange.

That on or about the twenty-third day of July, 1900, the membership or "seat" formerly owned by E. C. Hodges in said New York stock exchange was, on the application of the trustee in bankruptcy, duly sold through the proper officers of said exchange, under the rules, for the sum of thirty-nine thousand (39,000) dollars.

That at the time of the sale of said "seat," and prior to the paying over of any of the proceeds thereof, all stock exchange creditors of said Hodges & Company, including Otis, Wilcox & Company, were duly notified of a time fixed for proof of claims against said E. C. Hodges. The form of said notice was as follows:

New York Stock Exchange.

NEW YORK, *Aug.* 23, 1900.

.....

You are requested to appear before the committee on admissions,
on Thursday,..... ..... at 12 o'clock m.,
to substantiate your claim against
.....

Respectfully,

.....

Secretary of Committee.

12

Agreeably to a resolution passed by the committee, claimants will be required to exhibit in person, a transcript of their books, in substantiation of their claims.

That on receipt of notice of said time and place for such proof, Otis, Wilcox & Company wrote and mailed to the secretary of the New York stock exchange a letter, which was received by him, of which the following is a true copy:

CHICAGO, *Aug.* 25, 1900.

I am in receipt of your favor of the 23rd requesting my appearance before the committee on admissions on Thursday, the 30th, at twelve o'clock, to substantiate our claim against E. C. Hodges.

With regard to this claim we wish to say that we have made a settlement and relinquish whatever claim we had against Mr. Hodges' membership. Kindly communicate the above to committee on admissions and oblige,

Yours very truly, J. E. OTIS, JR.

The "settlement" mentioned in said letter was the setttement which Otis, Wilcox & Company, believed had been effected by said payments by Post & Flagg and A. L. Baker & Company on said executions.

That one Amory C. Hodges, a member of said stock exchange, did present a claim at said time fixed, for the sum of twenty-five hundred (2500) dollars, which was not allowed by said committee, and was not paid out of the proceeds of said seat.

That McIntyre & Wardwell released their attachment of funds in the hands of Post & Flagg, and appeared before said committee on admissions at the time fixed for the proving of claims, and made proof of their claim, which was allowed by said committee in a slightly reduced amount, viz., $34,685.05, and subsequently made proof thereof in the same amount as allowed by the committee of said exchange against the estate of E. C. Hodges & Company in this court, as a claim entitled to be paid in full on account of their lien duly established by the committee of said stock exchange, and were, in pursuance of said lien so established and the proof
13 of said claim in bankruptcy, paid the amount thereof by the proper officers of said stock exchange.

That after the expiration of the time allowed for making proofs of claims as above stated against said "seat," and after satisfying all claims so proved and commissions for selling and dues to the exchange, the proper officers of said exchange paid over to said trustee Hutchinson $4091.28 as the balance belonging to said Hodges's estate, and not required for the payment of claims proved against the Hodges "seat" in said New York stock exchange.

Otis, Wilcox & Company, did not appear before said committee on admissions pursuant to said notice, and did not present their said claim against E. C. Hodges & Company to said committee for allowance, for the sole reason that they believed that said claim had been paid by said payments by Post & Flagg and A. L. Baker & Company on execution. On April 4, 1901, they applied to said committee for an allowance *nunc pro tunc* of their said claim, but the committee ruled that the application could not be entertained.

The trustee, on or about January 7, 1901, instituted suit in New York city against Post & Flagg to recover from them the debt due E. C. Hodges & Company at the time of the institution of the proceedings in bankruptcy, and the trustee proposed to bring similar proceedings against said Chicago garnishees, A. L. Baker & Com-

pany, the claim of the trustee being that the adjudication in bankruptcy dissolved the said attachments and that said Post & Flagg and A. L. Baker & Company were thereafter accountable to him as trustee in bankruptcy. On January 14, 1901, the New York attorneys of Otis, Wilcox & Company, learned of said suit and assumed its defence under said agreement by Otis, Wilcox & Company, to save harmless Post & Flagg. They at once notified the Chicago attorneys of Otis, Wilcox & Company, and the Chicago attorneys at once placed the matter in the hands of Messrs. Ropes, Gray & Gorham, of Boston, by letter received February 1, 1901. Mr. Gorham took up the matter with the trustee, corresponded with the New York and Chicago attorneys of Otis, Wilcox & Company, and on March 9, 1901, filed the petition of Otis, Wilcox & Company. By agreement the trustee's New York suit against Post & Flagg was delayed to afford Mr. Gorham an opportunity fully to investi-
14 gate the matter and to draft agreed facts. The facts were subsequently agreed to, and the trustee and Mr. Gorham further agreed that the trustee's suit against Post & Flagg and his claim against A. L. Baker & Company should be settled by the immediate payment by Otis, Wilcox & Company, of the moneys due from Post & Flagg and from A. L. Baker & Company to the trustee, with interest and costs. Thereupon Mr. Gorham wrote to Chicago for the funds with which to make the payment. On April 29 the funds were received and paid to the trustee, as follows:—

Total paid		$5,196 07
Made up as follows:		
Post & Flagg, debt to bankrupts	$4,558 57	
Interest thereon from date of the trustee's demand to April 29, 1901	250 72	
Costs of trustee's New York suit against Post & Flagg	76 80	
A. L. Baker & Co., debt to bankrupts	293 82	
Interest thereon from date of the trustee's demand to April 29, 1901	16 16	
		$5,196 07

and the trustee received and applied the same in full settlement of the suit against Post & Flagg and the claim against A. L. Baker & Company.

In instituting and preparing his New York suit against Post & Flagg, the trustee incurred bills for counsel fees amounting to three hundred dollars, which sum the trustee claimed should be paid to him by Otis, Wilcox & Company, as a condition precedent to the maintenance of their petition, and it was agreed by the trustee and Mr. Gorham that that point should, without prejudice to either side, be left open for decision.

Either party may introduce further material testimony not incon-

istent with the above agreed facts. The New York statutes may be referred to.

ROPES, GRAY & GORHAM,
For the Petitioners, Otis, Wilcox & Co.
FREEDOM HUTCHINSON, *Trustee.*

15 *Opinion by Referee on Petition of Otis, Wilcox & Company.*

(Filed July 10, 1901.)

The petitioners having once received satisfaction of their claim through garnishee attachments which have been rendered void by the filing of the petition in bankruptcy, and having paid back to the trustee all moneys received by them under such attachments, with interest, now ask to be admitted as a creditor and be paid in full out of the balance of the proceeds of the sale of a seat in the New York stock exchange owned by the bankrupt Hodges, upon which, under the rules of the exchange, the petitioners had a membership lien, but of which they declined to avail themselves, relying upon the settlement which they had made through these garnishee proceedings.

These attachments were made on December 27, 1899, of funds in the hands of debtors of the bankrupts in New York and Chicago, respectively, with knowledge on the part of the creditor that a voluntary assignment had been made on that day, and the suits were pending on April 6, 1900, the date of the filing of the petition in bankruptcy. On May 29, 1900, the trustee notified the garnishees of the fact of his appointment and demanded payment of their respective debts, but both replied that they could not comply, as the funds in their hands were under attachment at the suit of these petitioners. Appearance was made for the defendants in both suits, but no suggestion of bankruptcy was filed, nor did the trustee intervene in either of them. No defence was interposed, the garnishees were charged, and judgment and execution were issued, upon which the New York garnishee, Messrs. Post & Flagg, on June 19, 1900, paid to the sheriff $4558.57, and shortly after, the Chicago garnishee, Messrs. A. L. Baker & Company, paid upon the execution against themselves $293.82, both of which amounts were duly paid to these petitioners and full satisfaction of their respective judgments was entered upon the record.

These petitioners and the bankrupt Hodges were both members of the New York stock exchange, the constitution of which provides that:

16 Article XIII, § 6.

All contracts, debts or obligations of every description, with, or to, members of the exchange, of a member who agrees to transfer his membership, shall become due and payable when notice of said agreement to transfer is posted upon the bulletin of the exchange, and shall be liquidated, and paid, as allowed by the committee on

admissions, out of the proceeds of said membership, upon consummation of the transfer thereof. This law shall also apply in every case where a membership is transferred by the committee on admissions.

and that—

Article XIV, § 6.

Any creditor failing to file with the secretary of the committee on admissions a written statement of his claim against a member, prior to the transfer of membership of such member, shall forfeit all right to a share of the proceeds of such membership until all claims filed prior to such transfer have been paid in full."

On or about July 23, 1900, upon the application of the trustee, the membership or "seat" of the said Hodges was sold under the rules of the exchange and through its proper officers for $39,000, and, on August 23, notice was accordingly sent by the secretary of the committee on admissions to the petitioners and other stock exchange creditors to appear before the committee on a certain day to substantiate their claims. In response to this notice one of such creditors, who had also attached the funds in the hands of Messrs. Post & Flagg, released his attachment, proved his claim before the committee, and the amount of the same, $34,685.05, was afterwards paid him. The petitioners, upon receipt of this notice, wrote to the secretary of the committee the following letter:

CHICAGO, *August* 25, 1900.

I am in receipt of your favor of the 23d, requesting my appearance before the committee on admissions on Thursday, the 30th, at twelve o'clock, to substantiate our claim against E. C. Hodges.

With regard to this claim we wish to say that we have made a settlement and relinquish whatever claim we had against Mr. Hodges' membership. Kindly communicate the above to committee on admissions and oblige,

Yours very truly, J. E. OTIS, JR.

17 which was duly received by him, and after the expiration of the time allowed for making proof of claims against the "seat," no other claims having been proved, the balance of the proceeds, less commissions, etc., amounting to $4091.28, was paid over to the trustee. These petitioners did not, therefore, appear before the committee, nor present any claim for proof within the time limited, but, upon April 4, 1901, they made application to the committee for an allowance of their claim, *nunc pro tunc*, but the committee refused to entertain it.

In January last, the trustee having brought suit against Messrs. Post & Flagg to recover the amount of their debt to the estate, these petitioners undertook the defence of the same, in pursuance of an agreement which they had made with the garnishees to hold them harmless on account of the payment of the funds in their hands upon the petitioners' judgments, but in March, upon the advice of counsel

other than those who had previously acted for them, they paid over to the trustee $5196.07, being the entire amount which they had received from the garnishees, with interest. The petition has been presented to me upon an agreed statement of facts, which is filed herewith and may be referred to.

The petitioners now come to the bankruptcy court and ask that in the exercise of its equity powers it would relieve them from the consequences of what is claimed by them to have been an innocent mistake in relying upon an attachment which they believed to be valid, and thus losing their lien upon the proceeds of the sale of the stock exchange seat, out of which their claim could have been realized in full or nearly so. Passing for the moment the question as to whether they can be admitted to appear as creditors of the estate at all, their claim appearing of record as having been fully paid and satisfied, it seems proper to consider first whether the case is one which calls for the exercise of the equity powers of the court; or, in other words, whether the trustee, as an officer of the court, has in his hands funds which in equity and good conscience should be paid to the petitioners. As remarked by James, L. J., *In re Condon*, 9 L. R. Ch. App. 609, the court of bankruptcy ought to be as honest as other people, and if it finds that the trustee has in his hands money which, in equity, belongs to some one else, it should
18 set an example to the world by paying it to the person really entitled to it. Is this court in that situation?

In the first place, this does not seem to me to fall within the numerous class of cases where the creditor has been allowed to withdraw or amend his proof, as in *Bemis v. Smith*, 10 Met. 194; *Franklin County Bank v. First National Bank*, 138 Mass. 515; *Nichols v. Smith*, 143 Mass. 455; *Pattee v. Page*, 163 Mass. 352; *Re Hubbard*, 1 Lowell, 190; *Re Brand*, 3 N. B. R. 324; *Re Clark*, 5 N. B. R. 255; *Re York*, 8 N. B. R. 241; *Re Connell*, 9 N. B. R. 387; *Re Parkes*, 10 N. B. R. 82, and others. Neither is it the same or similar to the case of *Re Condon*, above cited. There a creditor had paid to the trustee the proceeds of an execution sale under a mistake as to the legal effect of the filing of a petition for liquidation by the debtor, the creditors having failed to pass any resolution at the first meeting, which the court held ended the liquidation proceedings; and the debtor not having been adjudicated upon that petition but upon a later one filed by a creditor, it was held that the payment of the proceeds to the creditor by the sheriff was proper, and that the court had jurisdiction to relieve against the mistake of law and order the money to be repaid by the trustee. This decision was followed and extended in *Re Carnac*, 16 L. R., Q. B. D. 308, where a payment of income had been erroneously made to a trustee in liquidation by a trustee under a marriage settlement, and the court held that the ordinary rule that money paid under a mistake of law cannot be recovered back does not apply to a payment made under such a mistake to a trustee in bankruptcy, and that the court would direct its officer not to take advantage of such a mistake; or, as stated by Cotton, L. J., the proposition laid down in *Re Condon* is, that when the officer of the court has in his hands a sum of money which has been paid to

him erroneously under a mistake of law, the ordinary rule as between adverse litigants does not apply, but he will be ordered to repay it. And here the court extended the doctrine so far as to order the trustee to repay the money out of any funds in his hands, the specific money paid to him having been distributed in dividends. A like decision was made in *Dixon v. Brown*, 32 Ch. D. 597, where, power having been given to three of testator's children to sell real estate in order to avoid the difficulties of partition, sale was made by one of the three, who retained more than his share of the purchase-money and then went into liquidation. Further sales were made and out of the proceeds a further sum was paid to the trustee in liquidation of the delinquent trustee, in respect of, and in excess of, his share, which the court said should have been set off against the amount which he owed his *cestuis que trustent*, and having thus been paid to the trustee in liquidation under a mistake of law, it must be refunded.

In *Standard Oil Company v. Hawkins*, 74 Fed. 395, the circuit court of appeals for the seventh circuit decided that where a party had deposited money in an insolvent national bank, and had afterwards filed his claim with the receiver and taken a dividend, he might be allowed to reclaim the amount of such deposit out of other funds in the receiver's hands, and the court said that where a party having a choice of two remedies pursues one under a mistaken apprehension that the law affords him no other, and in ignorance of the existence of the other and more advantageous remedy, equity, in the absence of injury to others, or of facts creating an estoppel, may relieve him from the apparent election made under such mistake, and permit him to pursue the more advantageous one.

In the present case, it does not seem to me that the petitioners are either in the position of a secured creditor who by mistake proves his claim as unsecured and is afterwards allowed to withdraw his proof and take the benefit of his security, or in that of parties who have, under a mistake of law, paid to the trustee in bankruptcy money to which he was not legally entitled. All these parties were acting in conformity with the bankrupt law, and with a desire to govern their conduct in accordance with its provisions, but I do not think these petitioners can be so considered. A mere casual reading of section 67 of the bankrupt act would seem to indicate sufficiently to even a non-professional person that all attachments made within four months of the bankruptcy were rendered void by the terms of that section; and yet these petitioners, with full knowledge that bankruptcy existed, proceeded to avail themselves of the fruits of an attachment which the law holds them bound to know was entirely inoperative. They call it an innocent mistake on their part, but I am unable to so regard it. They seem to me, on the contrary, to have been acting, not in ignorance of the law, but in defiance of its provisions, and with the purpose of gaining an undue advantage over the other creditors.

I am also unable to class this case with those which hold that where a security founded upon a prior one is fatally tainted with the vice of usury, and the prior one is given up and cancelled, such

prior one will, if the later one is afterwards adudged void, be revived and may be enforced as if the later one had never been given, as stated in Collier on Bankruptcy (3d ed., p. 367), or with those that hold that where one has a valid lien which he surrenders when a transfer afterwards declared void is made to him, the former lien will be revived (*Avery v. Hackley*, 20 Wall. 407; *Burnhisel v. Firman*, 22 Wall. 170, and cases there cited), although there seems to be a certain analogy between them and the present case. The result appears to be that the court is now asked to go further than any bankruptcy court has gone yet, as far as I am aware, in the direction of giving equitable relief, and if this is to be done I prefer to leave such action to a court of more extended jurisdiction.

The other attaching creditor relinquished his attachment, proved his claim before the committee of the stock exchange and thus obtained payment of his debt. These petitioners had the like opportunity of doing the same. They, however, chose to rely upon their attachment which they must have known was invalid, and they cannot be held to be in the position of one who, having two remedies, of one of which he is ignorant, avails himself of the other, and is afterwards allowed to take the benefit of that which is the more advantageous. Neither are they in the position of one who has paid money to a trustee in bankruptcy under a mistaken idea of his duty to do so, and so is allowed to take his money back again. They said to the stock exchange committee, "We do not want your money; we have been paid," and the fund, or the residue of it, has been paid to the trustee. Notwithstanding the language of the decisions of the United States Supreme Court in *Hyde v. Woods*, 94 U. S. 523, and *Sparhawk v. Yerkes*, 142 U. S. 1, that such regulations of a stock exchange as were considered in those cases and exist in the present one were not invalid as being in conflict with the bankrupt act of 1867, and were not open to the objection
21 of the creation of a preference, I cannot help feeling that if I should order the trustee to pay a sum equal to the balance of the proceeds of the stock exchange seat to these petitioners, I should be giving them an undue and unfair advantage over the general creditors, or, in other words, be helping them to secure a preference. It is my duty to administer the bankrupt act, not to interpret or enforce the constitution and by-laws of the New York stock exchange, though as long as the proceeds of the sale of one of its seats remains under the control of its officers, I must defer to the decisions of the Federal court of last resort; but when such proceeds have been paid to the trustee in bankruptcy, I do not consider that I should be expected to revive the lien which any member of the exchange may have had upon them—certainly not under a state of facts such as are found in this case. Suppose, for instance, that a member of the exchange, having, by accident or misunderstanding, failed to seasonably prove his claim and thus lost his lien, should come before me and petition to be put back where he was before; I do not see how I could do this, at the expense of the other creditors, and these petitioners seem to me to be in a much more unfavorable position than such a creditor would be.

I feel satisfied that the petitioners are not entitled to the relief prayed for, at least at my hands. How far some court of superior jurisdiction may be willing to go in granting such equitable relief, I cannot tell. I believe that it will not go far enough to help these petitioners; but, at all events, I do not feel warranted in going to that length myself. Fortunately for the petitioners, the dividends in this case are substantial, and although their claim stands of record as paid and discharged, I think that they should be allowed to prove it and take their dividend with the other unsecured creditors. With regard to the expenses of the trustee in his suit against Messrs. Post & Flagg, the garnishees, it may be said that the interest paid by these petitioners is in excess of the amount so paid by the trustee, and, as the trustee would have received no interest from the designated depository of the court, if the funds in the hands of the garnishees had been paid to him when demanded, I think it only fair that the petitioners be not required to make this additional payment.

They have made full restitution as it is, and come into court
22 with clean hands to that extent, but I cannot free my mind from the conviction that their conduct in adhering to the course upon which they had entered and attempting to obtain payment of their claim out of funds which the merest novice could have told them belonged to the general creditors was deliberate and in wilful disregard of and in opposition to the provisions of the bankrupt act, and relief is denied them accordingly.

The petitioners are to be allowed to prove their claim as unsecured, and as to the other prayer of the petition the same must be denied, and it is so ordered.

LEWIS G. FARMER,
Referee in Bankruptcy, Acting for Referee Olmstead.

Boston, July 10, 1901.

Referee's Order on Petition of Otis, Wilcox & Co.

(Filed July 10, 1901.)

On the petition of Otis, Wilcox *et al.*, it is hereby ordered that the prayer of the same be, and it hereby is, denied in so far as it prays for a re-establishment of a lien upon the funds in the hands of the trustee, and that the claim of the petitioners be allowed as an unsecured debt against said estate.

Witness my hand this tenth day of July, A. D. 1901.

LEWIS G. FARMER,
Referee in Bankruptcy, Acting for Referee Olmstead.

Petition of Trustee for Review.

(Filed July 16, 1901.)

To Lewis G. Farmer, Esq., referee:

Respectfully represents Freedom Hutchinson, trustee of the estate of Frederick Swift *et al.*, that there is error in allowing Otis, Wilcox

& Company, to prove as creditors of said estate. He therefore requests that the question of whether or not the claim presented in their petition shall be allowed as a proof of claim by creditors of said estate be certified to the judge of the district court, together with the agreed facts and the finding and order of the referee thereon.

FREEDOM HUTCHINSON, *Trustee.*

23 *Petition by Otis, Wilcox & Company for Review.*

(Filed July 16, 1901.)

To the Honorable Lewis G. Farmer, referee in bankruptcy:

Respectfully petition Otis, Wilcox & Company, that the order disallowing their claim for payment in full against the above-entitled estate be certified to his honor the judge of the district court for review.

OTIS, WILCOX & CO.,
By their attorneys, ROPES, GRAY & GORHAM.

Certificate by Referee to Judge.

(Filed August 1, 1901.)

I, Lewis G. Farmer, one of the referees of said court in bankruptcy, acting herein for James M. Olmstead, referee, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings, to wit:

A petition having been filed by Otis *et al.*, asking that the trustee be directed to pay to them the balance of the proceeds of the sale of a seat in the New York stock exchange owned by the bankrupt Hodges upon which they at one time had a lien as creditors of the bankrupt and as members of the exchange, and which they had voluntarily abandoned having realized the amount of their claim from an attachment of funds in the hands of debtors of the bankrupts, which attachment has been avoided by the filing of the petition in bankruptcy, I heard the parties, and in accordance with opinion on file ordered that the prayer of the petition be denied, from which the petitioners have duly appealed.

Objection is made by the trustee to the granting of said petition on the ground that the record of the suit in which said attachment was made showed that the judgment had been satisfied, and that, therefore, the petitioners were no longer creditors of the estate. But upon this I ruled that although the record did disclose that fact, the petitioners having paid back to the trustee, with interest, all the money received by them in satisfaction of said judgment, they
24 were entitled to be allowed to prove their claim and take a dividend as general creditors, and it was so ordered, from which ruling and order the trustee of said estate has duly appealed.

And the said questions are certified to the judge for his opinion thereon.

Dated at Boston this nineteenth day of July, A. D. 1901.

LEWIS G. FARMER,
Referee in Bankruptcy, Acting for Referee Olmstead.

Opinion of the District Court.

November 4, 1901.

LOWELL, *J.*:

Wilcox, a creditor of the bankrupt, sued him and garnisheed Post & Flagg less than four months before the filing of the petition. Thereafter he proceeded to judgment, took out execution, and collected from Post & Flagg the amount due him from the bankrupt, in the belief that it had been duly recovered under a valid garnishment, and that there had thus been effected a full settlement of the judgment rendered against the bankrupt. The judgment was entered satisfied. At that time Wilcox knew that bankruptcy proceedings were pending, and that Swift's trustee claimed the debt owed by Post & Flagg. As Post & Flagg had been informed of the bankruptcy, they took a bond from Wilcox to indemnify them in case of loss. Still later, Wilcox was notified that the bankrupt's seat in the New York stock exchange had been sold. The rules of the exchange gave Wilcox a lien upon the proceeds of the seat for the amount of the bankrupt's debt to him, and he was invited to prove his claim against the bankrupt in the manner prescribed by the rules. To this notice he replied that he had already made a settlement with the bankrupt, and that he relinquished whatever claim he had against the bankrupt's membership. The trustee brought suit against Post & Flagg to recover their debt to the bankrupt's estate. As the garnishment made by Wilcox was void under section 67 of the bankrupt act, the payment by Post & Flagg to Wilcox did not avail them to resist the trustee's suit. Wilcox was called upon under his bond of indemnity, and agreed with the trustee that the trustee's suit against Post & Flagg should be settled by the payment by Wilcox of the money due the trustee from Post & Flagg. The payment was made, and the trustee received and applied the same in full settlement of his suit. Wilcox now seeks to prove against the bankrupt's estate, and to reinstate his lien upon the proceeds of the bankrupt's seat in the stock exchange which have been paid over to the trustee.

While none of the cases cited in argument are exactly like the case at bar, yet the latter does not differ substantially from cases in which it has been held that a creditor, who has relinquished a security by mistake, either of law or of fact, should be reinstated in his security by the court of bankruptcy, if the estate will be left by the reinstatement no worse off than if the security had been originally retained. *In re Condon*, L. R., 9 Ch. Ap. 609; *Standard Oil Company v. Haw-*

kins, 74 Fed. Rep. 395; *Union Bank of Chicago v. McKey*, 102 Fed. Rep. 662.

In *In re Condon*, it is true, the money was paid directly to the trustee by the party held to be equitably entitled, and was recovered directly from the trustee as paid under a mistake of law. Here the transaction was not quite so simple. Wilcox released to the trustee his lien on the seat in the stock exchange, believing that his claim against the bankrupt had been settled under the attachment. This belief was the mistake of law. He released his security, believing that he was no longer the bankrupt's creditor.

Proof of a debt as unsecured ordinarily releases any security for the debt held by the creditor making proof. If a secured creditor believes he is unsecured, and proves accordingly, thus releasing his security, even though his mistake be caused by pretty stupid ignorance of the law, yet it is held that his proof can be recalled and his release thereby avoided, "when all parties can be placed in the same situation they would have been in if the error had not occurred." *In re Parker*, 10 N. R. B. 82, 83. If the release of a security can be avoided because the release was caused by a mistaken belief that the debt was unsecured (*Standard Oil Company v. Hawkins*, 74 Fed. Rep. 395), there should be possibility of avoidance, where the release was caused by a mistaken belief that the debt secured had ceased to exist.

26 The trustee argued that, as he did not and could not recover from Wilcox the money paid Wilcox by Post & Flagg, the bankrupt's debt to Wilcox remains satisfied by the satisfaction obtained of the judgment recovered against the bankrupt. He contended that the bond given by Wilcox to Post & Flagg is not to be taken as part of the transaction, but as something with which the trustee has no concern. But it is not clear that the trustee was without remedy directly against Wilcox, and moreover, considering the bond of indemnity in connection with the negotiations between Wilcox and the trustee, and with the settlement they both entered into, it appears to me that equity will treat the payment to the trustee by Wilcox as a restitution made by Wilcox of money belonging to the bankrupt's estate which had come into Wilcox's hands, thus reviving Wilcox's claim. In the Condon case above cited, the creditor took the proceeds of goods of the bankrupt sold on execution. These proceeds he subsequently paid over to the trustee, believing himself bound in law to do so. If his belief had been correct, can it be supposed that his claim against the bankrupt would have been satisfied by the levy of execution? It was suggested that, in this case, Wilcox sought to secure an unfair advantage by realizing under his garnishment. If he did so, if he sought to evade the bankrupt act, he cannot now appeal to the equitable consideration of this court; but the agreed facts state expressly that he received payment from Post & Flagg in the belief that the money had been duly recovered from them under a valid attachment. He knew of the bankruptcy, but he may not have known when it took place. For many purposes the adjudication may give notice to all the world, but I do not think it gives such notice as to make a person who fails

to govern his conduct by it guilty of so wilful an attack upon the law that he should be deprived of a security to which he is otherwise equitably entitled. That ignorance of the law excuses no one is not a maxim of universal application. Against some mistakes of law a court of bankruptcy will relieve. Actual knowledge that bankruptcy proceedings were pending, and constructive knowledge of their date, of all the language of the act, and of the correct interpretation thereof, will not turn an otherwise innocent mistake of law into a guilty one. Again, Wilcox knew that the trustee claimed to recover from Post & Flagg, but as he also believed that his
27 own attachment was valid, he was under a mistake of law or of fact. That the mistake was unreasonable, that he ought to have known better, even if true, does not appear to me material, so long as he acted in good faith, as the agreed facts declare.

It was urged further that Wilcox cannot now get the benefit of his lien, because that lien can be established only according to the rules of the stock exchange, out of whose hands the money had passed. But the rules of the stock exchange do not establish any method of formal proof as a condition precedent to the existence of the lien. They establish the lien generally, and then provide for the ascertainment of the amount of the debt. As that amount is found in the agreed statement of facts, Wilcox should be permitted to prove therefor, and to receive satisfaction out of the proceeds of the seat, as far as those proceeds will go.

The judgment of the referee is modified accordingly, but the creditor will recover no costs of this proceeding. He must pay the costs of the suit against Post & Flagg, taxed as between solicitor and client.

Decree on Certificate by Referee to Judge.

(*Ex Parte* OTIS, WILCOX & Co.)

At Boston, in said district, on the fourth day of November, A. D. 1901, upon the question certified to the court by the referee in said matter, on the 1st day of August, A. D. 1901, now, therefore, after hearing arguments of Freedom Hutchinson, trustee, and of R. S. Gorham, Esq., of counsel for Otis, Wilcox & Company, creditor, and after due consideration of the same; and the said Otis, Wilcox & Company, having filed, by consent of the trustee, an amended proof of claim to be substituted for the proof annexed to their original petition, it is hereby ordered and decreed that the judgment of the referee be reversed, and that the said substituted proof be allowed, and that the trustee pay to Otis, Wilcox & Company, the balance of the proceeds of the seat in the New York stock exchange, to the amount of $4091.28 on account of their claim, and that for the remainder they may be admitted to receive dividends. And it is fur-
ther ordered and decreed that Otis, Wilcox & Company, pay
28 to the trustee three hundred dollars paid by him to counsel in suit against Post & Flagg, and recover no costs of these proceedings.

It is further ordered that the clerk send a copy of this order by mail to the referee.

Witness the Honorable Francis C. Lowell, judge of said court, and the seal thereof, this fourth day of November, A. D. 1901.

[SEAL.] F. S. FISKE,
Deputy Clerk.

Appeal of Trustee and Assignment of Errors.

(Filed November 6, 1901.)

Appeal of trustee.

To the honorable the judge of the district court of the United States for the district of Massachusetts:

Respectfully represents Freedom Hutchinson, trustee in bankruptcy of the estate of Frederick Swift *et al.*, that at a hearing before this honorable court, on a petition by Otis, Wilcox & Company, to be admitted as a creditor, to be paid in full out of the proceeds of the seat held by E. C. Hodges & Company in the New York stock exchange, on a question certified by the referee, this court found that said Otis, Wilcox & Company, should be permitted to prove their claim and to receive satisfaction out of the proceeds of said seat, so far as those proceeds will go.

From the decision of this court the trustee respectfully appeals, and prays that his appeal may be allowed.

FREEDOM HUTCHINSON, *Trustee.*

November 6, 1901.

Allowed:
FRANCIS C. LOWELL.
U. S. District Judge.

Assignment of Errors.

Now comes Freedom Hutchinson, trustee in bankruptcy of the estate of Frederick Swift *et al.*, after the decision of this court allowing the petition of Otis, Wilcox & Company, and files the following assignment of errors, on which he will rely on his appeal.

First. That the court erred in allowing Otis, Wilcox & Company, to prove as creditors.

29 *Second.* In allowing the proof of Otis, Wilcox & Company, as annexed to their petition.

Third. In granting equitable relief to Otis, Wilcox & Company.

Fourth. In holding that Otis, Wilcox & Company, were entitled to a lien on the proceeds of the stock exchange seat paid to the trustee on account of a claim which had not been allowed by the committee on admissions of the stock exchange.

Fifth. In holding that Otis, Wilcox & Company, were entitled to be paid by virtue of a lien on any moneys paid to the trustee.

Sixth. In holding that Wilcox released to the trustee his lien on the seat in the stock exchange.

Seventh. In holding that equity will, or can, under the agreed facts, treat the settlement by Wilcox of the trustee's suit against Post & Flagg as a restitution made by Wilcox of money belonging to the bankrupts' estate, which had come into Wilcox's hands.

Eighth. In holding that the settlement of the trustee's suit against Post & Flagg revived the claim of Wilcox against the bankrupts' estate, which had been settled and discharged.

Ninth. In holding that the agreed facts declare that Wilcox acted in *good faith.*

FREEDOM HUTCHINSON, *Trustee.*

Motion of Trustee to be Allowed to Amend His Assignment of Errors and Order Thereon.

(Filed November 14, 1901.)

Now comes the trustee in the above-entitled cause and moves that he may be allowed to amend his assignment of errors by adding the following:

Tenth. That the court erred in allowing the proof filed and allowed, as of the 4th of November, 1901, to be substituted for the proof annexed to the original petition.

Eleventh. That the court erred in allowing said substituted proof.

FREEDOM HUTCHINSON, *Trustee.*

The foregoing amendment is hereby allowed.
By order of court, November 14, A. D. 1901.
[SEAL.] F. S. FISKE,
Deputy Clerk.

30 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Otis, Wilcox & Company, of Chicago, in the northern district of Illinois, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Massachusetts, on the fifth day of December next, pursuant to an appeal duly obtained from a decree of the district court of the United States for the district of Massachusetts, wherein Freedom Hutchinson, as he is trustee in bankruptcy of the estate of Frederick Swift *et al.*, is appellant, and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Francis C. Lowell, judge of the district court of the United States for the district of Massachusetts, this

sixth day of November, in the year of our Lord one thousand nine hundred and one.

FRANCIS C. LOWELL,
U. S. District Judge.

Nov. 7, 1901.

Service accepted for Otis, Wilcox & Company.

ROPES, GRAY & GORHAM.

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

I, Frank H. Mason, clerk of the district court of the United States for the district of Massachusetts, certify that the foregoing are true copies of the following papers filed in said court in the cause in bankruptcy,

No. 2745.

In the Matter of FREDERICK SWIFT ET AL., Bankrupts.

(1) Petition of Otis, Wilcox & Company.
(2) Substituted proof of claim.
(3) Agreed facts.
(4) Opinion of referree.
31 & 32 (5) Order of referee on petition.
(6) Petition of trustee for review by judge.
(7) Petition of creditor for review by judge.
(8) Certificate by referee to judge.
(9) Opinion of district court.
(10) Decree of district court.
(11) Trustee's petition for appeal.
(12) Assignment of errors.
(13) Amendment to assignment of errors,

and also the original citation issued upon the appeal of the trustee in said matter, with the acceptance of service thereof.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said district, this fifteenth day of November, A. D. 1901.

[SEAL.] FRANK H. MASON, *Clerk.*

33 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

FREEDOM HUTCHINSON, Trustee, Appellant,
v.
OTIS, WILCOX & COMPANY, Creditors, Appellees. } No. 415.

No. 416 (original).

FREEDOM HUTCHINSON, Trustee, Petitioner.

Appeal from and petition for revision of proceedings in the district court for the district of Massachusetts.

Before Colt, Putnam, and Webb, JJ.

Opinion of the Court.

May 22, 1902.

PUTNAM, *J.:*

These cases relate to proceedings in the district court for the district of Massachusetts, sitting in bankruptcy, with reference to questions between the trustee of E. C. Hodges & Company in bankruptcy and Otis, Wilcox & Company. The leading facts are well stated in the opinion of the learned judge of the district court, as follows:

"Wilcox, a creditor of the bankrupt, sued him and garnisheed Post & Flagg less than four months before the filing of the petition. Thereafter he proceeded to judgment, took out execution, and collected from Post & Flagg the amount due him from the
34 bankrupt in the belief that it had been duly recovered under a valid garnishment, and that there had thus been effected a full settlement of the judgment rendered against the bankrupt. The judgment was entered satisfied. At that time Wilcox knew that bankruptcy proceedings were pending, and that Swift's trustee claimed the debt owed by Post & Flagg. As Post & Flagg had been informed of the bankruptcy, they took a bond from Wilcox to indemnify them in case of loss. Still later, Wilcox was notified that the bankrupt's seat in the New York stock exchange had been sold. The rules of the exchange gave Wilcox a lien upon the proceeds of the seat for the amount of the bankrupt's debt to him, and he was invited to prove his claim against the bankrupt in the manner prescribed by the rules. To this notice he replied that he had already made a settlement with the bankrupt, and that he relinquished whatever claim he had against the bankrupt's membership. The trustee brought suit against Post & Flagg to recover their debt to the bankrupt's estate. As the garnishment made by Wilcox was void under section 67 of the bankrupt act, the payment by Post & Flagg to Wilcox did not avail them to resist the trustee's suit. Wilcox was called upon under his bond of indemnity, and agreed with the trustee that the trustee's suit against Post & Flagg should be

settled by the payment by Wilcox of the money due the trustee from Post & Flagg. The payment was made, and the trustee received and applied the same in full settlement of his suit. Wilcox now seeks to prove against the bankrupt's estate, and to reinstate his lien upon the proceeds of the bankrupt's seat in the stock exchange which have been paid over to the trustee."

This statement, however, requires to be supplemented by a few additional facts. There were two garnishee suits instead of one, each standing on the same basis. The bankrupts, who are residents of Massachusetts, made a voluntary assignment for the benefit of creditors on December 26, 1899. Otis, Wilcox & Company, who are residents of Illinois, and, therefore, not affected by the assignment so far as assets beyond the jurisdiction of the State of Massachusetts were concerned, brought trustee suits, as explained by the learned judge of the district court, in Illinois and New York, on the same day that the assignment was made. The petition in bankruptcy was filed against E. C. Hodges & Company in the district of Massachusetts on April 6, 1900. They were ad-
35 judged bankrupts on the twenty-seventh day of the same month of April, and Mr. Hutchinson was appointed trustee on the twenty-third day of the following May. The agreed statement which we find in the record, referring to the amounts which Otis, Wilcox & Company received by virtue of their garnishee suits, says that they received them in the belief that they had been duly recovered under valid attachments, and that, thus, there had been effected full settlements of their judgments against E. C. Hodges & Company. It is true it also states that Otis, Wilcox & Company received the proceeds of their judgments knowing of the pendency of the bankruptcy proceedings against E. C. Hodges & Company, and knowing that the trustee in bankruptcy claimed that the garnishees were liable to pay to him the debts covered by the garnishments. These statements, however, need explanation.

Under the bankruptcy act of 1867, with its amendments, the transfer of the bankrupt's assets was accomplished by a formal assignment, executed by the district court or the register in bankruptcy. That assignment, on its face, related back to the date of the commencement of proceedings in bankruptcy, and expressly stated what that date was; so that any person informed of the assignment was thereby informed of this essential fact. Under the present act, there is no formal assignment, but merely an order, which fails to state the date of the commencement of the proceedings, and, therefore, necessarily fails to make known that the transfer of the assets of the bankrupt relates to that date. Otis, Wilcox & Company, so far as the record is concerned, received their knowledge of the pendency of the bankruptcy proceedings, and of the claim of the trustee that he was entitled to the debts which they had garnisheed, by letters sent by the trustee to the garnishees, or one of them, under date of May 28, 1900. These enclosed copies of the appointment of Mr. Hutchinson as trustee, but, so far as the record goes, they gave no information as to the date of the commencement of the

proceedings. On April 27, 1900, the garnishee suits of Otis,
36 Wilcox & Company had been running four months, so that their claims were then apparently secured; and, so far as the case shows, never, until after the collection of their judgments in the garnishee suits, were they informed that the proceedings in bankruptcy were commenced in the early part of that month. The record does not expressly state whether the belief of Otis, Wilcox & Company as to the status of the garnishee suits was based on a mistake of law, or on a mistake of fact arising through ignorance of the date when the proceedings in bankruptcy were commenced. Inasmuch as, on one of the proceedings before us, we are limited to "matter of law," it is fortunate that we do not find it necessary, on this point, to make a finding of fact. We reach this conclusion as the result of putting an interpretation on the record. We would not be justified, in the absence of a necessary conclusion to that effect, in finding, to the prejudice of a resident of the United States, that he was ignorant of the laws thereof. Therefore, as the record leaves the matter open, we are bound to conclude that, in all the proceedings which it is necessary for us to consider, Otis, Wilcox & Company acted under a mistake of fact, and not a mere mistake of law; although it is settled beyond question that parties acting under a mistake of law will not, necessarily, be held to that mistake by a court of bankruptcy when the result would be to do substantial injustice.

In this connection, we ought to observe that, whatever mistake Otis, Wilcox & Company made, has not resulted to the prejudice of any one, that no one has relied on it in such way that he would now be harmed by its being corrected, and that the trustee cannot build up any estoppel thereon, because, as we said in *Hutchinson, trustee, v. Le Roy*, 113 Fed. Rep., 202, a trustee in bankruptcy, like all other representatives of insolvent estates, takes only the equities of the bankrupt.

Within the year limited by the statute for proof of claims in bankruptcy, Otis, Wilcox & Company filed a proof which
37 failed, in very substantial particulars, to comply with the general orders of the Supreme Court in reference to such matters. Subsequently, after the expiration of the year, they filed a substituted proof of a claim, alleged to be secured in part by that portion of the proceeds of the sale of the seat of the bankrupts in the New York stock exchange which had been paid over to the trustee. Previously, they had filed a petition that the court should direct the amount so received by the trustee to be paid to them. After a full hearing of the case, the court, on November 4, 1901, entered the following decree:

"At Boston, in said district, on the fourth day of November, A. D. 1901, upon the question certified to the court by the referee in said matter, on the 1st day of August, A. D. 1901, now therefore, after hearing arguments of Freedom Hutchinson, trustee, and of R. S. Gorham, Esq., of counsel for Otis, Wilcox & Company, creditor, and after due consideration of the same, and the said Otis, Wilcox & Company having filed, by consent of the trustee, an amended proof

of claim to be substituted for the proof annexed to their original petition, it is hereby ordered and decreed that the judgment of the referee be reversed, and that the said substituted proof be allowed, and that the trustee pay to Otis, Wilcox & Company the balance of the proceeds of the seat in the New York stock exchange, to the amount of $4091.28, on account of their claim, and that for the remainder they may be admitted to receive dividends. And it is further ordered and decreed that Otis, Wilcox & Company pay to the trustee three hundred dollars paid by him to counsel in suit against Post & Flagg, and recover no costs of these proceedings."

This decree covers two subject-matters: first, an allowance of the substituted proof of a claim partly secured; and, second, a judgment that the trustee pay to Otis, Wilcox & Company the balance of the proceeds of the seat in the exchange which he had received. The result is that we have pending before us with reference to that decree both an appeal and a revisory petition. Among the errors assigned on the appeal is that the court below erred in allowing the substituted proof. This, of course, raises a question which properly comes before us on appeal. The substance of the other errors assigned
38 is that Otis, Wilcox & Company are not entitled to any lien on the money received by the trustee on account of the seat in the exchange. This, of course, raises a question which comes before us only on the petition.

Heretofore, when we have had before us an appeal and a simultaneous revisory petition, with regard to proceedings by the district court which were supposed to be on its bankruptcy side, we have assumed that each had reference to supervision in the appellate tribunals in accordance with section 57, of the bankruptcy act of July 1, 1898. The first instance of this kind was in *In re Worcester County*, 102 Fed. Rep. 808, decided by us on April 20, 1900. Then there was no question that the proceedings before us arose under section 57, because nothing was involved except a proof of debt and a priority in bankruptcy. In subsequent cases, we have assumed that all the proceedings were taken by virtue of section 57, because the parties themselves so assumed; but such instances have now become so numerous that we deem it necessary to express ourselves in a cautionary way, in order that it may not be accepted that we have determined anything on that particular point. In *Hutchinson v. Le Roy*, already referred to, the question was one of an adverse claim on the part of Le Roy to a fund in the hands of the trustee; and the substantial question in the proceedings now before us is of the same character. We wish merely to say that we have not determined, and we do not now determine, whether such claims arise strictly on the bankruptcy side of the district court, or should be regarded as within the rules governing summary intervening petitions against a fund in the registry of a court, or in the hands of its officers or appointees, whether the court be one of equity, bankruptcy, admiralty, or, even, sitting at common law. We reserve all such questions for determination at some future time, when they have been raised by parties, and it becomes necessary to pass on them. They are of a substantial character. With reference to a proceeding in the dis-

trict court in the nature of a summary intervening petition
39 under general juridical rules, and not controlled by section 57 of the bankruptcy act of July 1, 1898, an appellate tribunal would not be limited to matters of law, and it could pass on the entire merits, as on other ordinary appeals concerning such petitions. Morever, under those circumstances, the right to an appeal to the Supreme Court from the circuit court of appeals might depend on the statute establishing the latter court, and not on anything found in the statutes of bankruptcy.

We now come to the appeal. The only ground to which it can relate is the objection to the substituted proof because it was not filed within the year limited by the terms of the statute. This, however, is easily disposed of. Courts of bankruptcy, like courts of admiralty, permit amendments with a most liberal hand; and as there was enough in the original proof by which to amend, and as the district court thought it was equitable to allow the amendment, the appeal cannot be maintained. In addition thereto, it may well be observed that the provision of section 60 of the bankruptcy act of July 1, 1898, which limits the time for proving claims, reads as follows:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment."

If the statute is to be construed in the same spirit in which other remedial statutes are, and not in a literal way, there might be reason for holding that this provision, extending the time for proof with reference to claims "liquidated by litigation," reaches every case in which a question arises, and which comes into a judicial tribunal within the year limited, if the question, in any manner, involves the determination of the net amount for which the claim shall be finally allowed. In any event, the appeal cannot he sustained.

Coming now to so much of these proceedings as relates to the right of Otis, Wilcox & Company to the amount remitted by
40 the New York stock exchange to the trustee, we wish to observe, first of all, that the trustee relies on the fact, as stated by him, that Otis, Wilcox & Company, having given indemnity to the garnishees, settled the trustee's claims against them by themselves paying the trustee; so that the trustee seems to understand that, inasmuch as Otis, Wilcox & Company did not repay to the garnishees the amounts collected from them, the transactions growing out of the garnishments were not annulled. But it is not necessary to state with detail the various propositions pro and con relating to these transactions, because the law does not look at the mere form of effecting restitution. The ultimate result was that Otis, Wilcox & Company received nothing by their proceedings against the garnishees; and, inasmuch as they acted under a mistaken belief of fact, it follows, according to the well settled rules of law, that all their transactions with which the record is encumbered went for

naught, and that, therefore, in the eyes of the law, everything stands precisely as though they had taken no steps whatever. The law itself restores the prior condition, without any resort to the peculiar remedies of the chancery courts, or to any other formalities whatever, except, merely, that it was necessary that Otis, Wilcox & Company should advise the parties concerned that they reclaimed their original position.

Of course, if, meanwhile, any individual or official, relying on the notice given by Otis, Wilcox & Company to the exchange that they made no claim on the proceeds of the bankrupts' seat, had done, or omitted to do, anything, so that he would have been prejudiced by the effect of a subsequent reclamation by Otis, Wilcox & Company, further examination of this point would be required; but we have seen that there is nothing of this kind. So, also, if Otis, Wilcox & Company had executed to the exchange, or to the trustee, or to any one else, a formal instrument under seal, releasing or transferring any right, it might be necessary to ask a chancery court, or the district court exercising its equity powers, to decree
41 a cancellation. That such a decree would unhesitatingly be conceded, in the event the rights of no other persons had meanwhile intervened, is so well settled that we need not dwell on the point. Indeed, even where, under a mistake, mortgagees have discharged mortgages of real estate on the public records in the most formal manner, chancery has not hesitated to order cancellation. We refer to this, not because any such special remedy is needed in the case at bar, as we have said it is not, but for the purpose of illustrating the underlying principle. In lieu of a formal release or assignment, what appears in the record is only the following letter from a gentleman representing Otis, Wilcox & Company to the New York stock exchange:

"CHICAGO, *Aug.* 25, 1900.

I am in receipt of your favor of the 23d, requesting my appearance before the committee on admissions on Thursday, the 30th, at twelve o'clock, to substantiate our claim against E. C. Hodges.

With regard to this claim, we wish to say that we have made a settlement, and relinquish whatever claim we had against Mr. Hodges' membership. Kindly communicate the above to committee on admissions, and oblige,

Yours very truly, J. E. OTIS, JR."

Although not directly so stated, the letter makes it plain that the condition of the relinquishment of the exchange was that Otis, Wilcox & Company understood that they had made a full settlement of the debt which E. C. Hodges & Company owed them. Therefore, as there was merely this letter of advice, the law itself, without the aid of the equity courts, could, and, on Otis, Wilcox & Company discovering their mistake and making their claim on the trustee, did, annul all their prior proceedings, and restore all the same rights as though such proceedings had not taken place. Therefore, we have no occasion to discuss the proposition that no man is entitled to the

aid of courts of equity when that aid becomes necessary
42 through his own fault, because, in the first place, it is too broad in any view, in that it is among the highest prerogatives of those courts to accomplish justice sometimes in behalf even of one who has been imprudent, and because, in the present case, as we have said, the restoration of the rights of Otis, Wilcox & Company was effected without the aid of any of the special remedies to which chancery is accustomed.

The only substantial doubt is raised by the constitution of the New York stock exchange, extracts from which are found in the record. These are susceptible of such a construction as to bar any lien in favor of a member of the exchange who does not prove his claim to its committee named in the constitution. They are, however, equally susceptible of a different construction; and, inasmuch as their substantial purpose is to secure other members against a defaulting member by a lien on the proceeds of his seat, we ought, in the absence of clear language to the contrary, to adopt such an interpretation as accomplishes that intent. Appreciating the fact that the New York stock exchange, like other similar exchanges in the great commercial marts, is, so to speak, "domestic" in its character, and reserves to itself the determination of all questions arising between its various members so far as it is practicable and lawful so to do, we, perhaps, would decline to interfere in the disposition of this fund if it still remained with the exchange. But, after the exchange had parted with it, the possibility of its taking jurisdiction in reference thereto ceased, and we do no injustice to any one, and do not interfere with any "domestic" policy, by now substituting ourselves in place of its committee. We are encouraged in this, if not fully sustained, by the expressions in *Clews v. Jamieson*, 182 U. S. 461, 495, 496, with reference to the rules of the Chicago stock exchange, although it is true that the rules there referred to related to the adjustment of accounts between its members, and not to the particular topic which we have before us. The opinion says:

"The sales were made subject to the rules referred to, but so far as regards a remedy for their violation, those rules provide
43 a means by which parties may seek and obtain relief in accordance with their terms. They do not assume to exclude the jurisdiction of the courts, or, in other words, they do not assume to provide an exclusive remedy which the parties must necessarily follow, and which they have no right to refuse to follow without violating such rules, and thereby violating their contract."

So, in the present case, we may well say that, inasmuch as the extracts from the constitution of the exchange before us do not "assume to exclude the jurisdiction of the courts," or "assume to provide an exclusive remedy," because they contain no express terms to that effect with reference to the existing circumstances shown by this record, we may now justly adjudicate in reference hereto. Consequently, we hold that Otis, Wilcox & Company had a lien and equitable security on the fund while it was in the hands of the exchange, that the rules of the exchange did not interpose any limitation of time, that their rights thereto were only intermitted

and not lost, and that their lien followed the fund into the hands of the trustee in bankruptcy; so that the decree of the district court in that respect was correct.

The parties have raised before us no question with reference to interest on the fund in issue, but we find it necessary to consider it. Ordinarily, an appellant, or other party, who has postponed by a proceeding in an appellate tribunal the payment of an amount justly due, should pay damages therefor equal, at least, to legal interest, even if he has not received any increment of the fund corresponding thereto. In *Hutchinson v. Le Roy*, 113 Fed. Rep. 202, already referred to, we allowed interest against the petitioner; but, there, the fund which it was determined belonged to him had been held adversely from the outset, as it grew out of a tort of the bankrupt which arose before proceedings in bankruptcy were commenced. In the present case, however, the fund came into the hands of the trustee in bankruptcy, not through any tort, but through the oversight of Otis, Wilcox & Company. The trustee merely held it until
44 the courts could determine to whom it belonged, and the record does not show that the trustee has received any increment thereof. Under the circumstances, and as this appeal was taken by the trustee in his official capacity to settle a question involving substantial doubts, we think that interest should not be allowed. We have discussed the matter of interest under circumstances of like special character in *New England R. Co. v. Carnegie Steel Co., Limited*, 75 Fed. Rep. 54, 59, and in *The H. F. Dimock*, 77 Fed. Rep. 226, 239, 240. In *New England R. Co. v. Carnegie Steel Co., Limited*, the fund was, for a portion of the time, held under conditions analogous to those at bar, in that it was in the hands of the court. So far as that period was concerned, we followed *Thomas v. Western Car Company*, 149 U. S. 95, 116. For the remaining period, the fund was in the hands of the New England Railroad Company, having been transferred to it by the order of the court; and, as that corporation took out the appeal, which was decided against it, we awarded interest from the time it was taken.

In No. 415, *Hutchinson, trustee, appellant, against Otis, Wilcox & Company, appellees, the decree of the district court allowing the appellees' proof of claim is affirmed, and the costs of appeal are awarded to the appellees.*

In No. 416, *Hutchinson, trustee, petitioner, the decree of the district court directing the payment by the trustee to Otis, Wilcox & Company of four thousand ninety-one dollars and twenty-eight cents, is affirmed, without interest; the costs on the petition are awarded to the respondents; and the district court is directed to give effect to this decree, both as to debt and costs.*

45 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

FREEDOM HUTCHINSON, Trustee, Appellant,
v.
OTIS, WILCOX & COMPANY, Creditors, Appellees. } No. 415.

Final Decree.

May 22, 1902.

This cause came on to be heard January 15 and 16, 1902, upon the transcript of the record of the district court of the United States for the district of Massachusetts, and was argued by counsel:

On consideration whereof, it is now, to wit, May 22, 1902, here ordered, adjudged and decreed, as follows: The decree of the district court allowing the appellees' proof of claims is affirmed, and the costs of appeal are awarded to the appellees.

By the court:

JOHN G. STETSON, *Clerk.*

46 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

FREEDOM HUTCHINSON, Trustee, Appellant,
v.
OTIS, WILCOX & COMPANY, Creditors, Appellees. } No. 415.

Motion by Freedom Hutchinson, trustee, to reopen decree.

(Presented in court and filed May 29, 1902.)

To the honorable the justices of the United States circuit court of appeals for the first circuit:

And now comes Freedom Hutchinson, trustee, in the above-entitled action and prays that the judgment and decree of this court heretofore entered on the 22nd day of May, 1902, be reopened, to the end that when this court again enters its judgment or decree it will make and file a finding of facts and its conclusions of law thereon stated separately, that the party aggrieved by said judgment or decree may be able to prosecute his appeal to the Supreme Court of the United States.

FREEDOM HUTCHINSON, *Trustee.*
ALBERT S. HUTCHINSON,
Attorney for Trustee.

47 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

FREEDOM HUTCHINSON, Trustee, Appellant,
v.
OTIS, WILCOX & COMPANY, Creditors, Appellees. } No. 415.

No. 416 (Original).

FREEDOM HUTCHINSON, Trustee, Petitioner.

No. 418 (Original).

HEMAN OSBORNE, Bankrupt, Petitioner.

Appeal from and petitions for revision of proceedings in the district court for the district of Massachusetts.

Before Colt and Putnam, circuit judges.

Opinion of the Court.

September 4, 1902.

PUTNAM, *J.*:

In each of these cases, an appeal has been claimed to the Supreme Court. The first case is an appeal to us by a trustee in bankruptcy, with reference to a proof of claim which was allowed by the district court, and the allowance affirmed by us. The second is a petition for the revision of a decree of the district court, directing a payment of funds in the hands of the trustee on the ground that the amount decreed to be paid belonged to the proponent in the district court, on which petition we affirmed the decree. The third is a petition asking us to revise a decree of the district court, refusing a discharge to the bankrupt, Osborne, in which case, also, we
48 affirmed the order of the court below. In each, the party now claiming an appeal was the actor in this court.

With reference to the first case, it is so clear that the provision in section 25*b* of the act of July 1, 1898, granting appeals to the Supreme Court from final decisions of the circuit courts of appeals allowing or rejecting claims offered in proof in bankruptcy, is exclusive with reference to that subject-matter, that it is not necessary that we should enlarge thereon. On this proposition, without pointing out its other qualifications touching the jurisdiction of the Supreme Court, it is certainly enough to refer to the fact that, under section 6 of the act of July 1, 1891, the jurisdictional amount is $1,000, while under section 25*b* it is $2,000. Of course, the two cannot stand together. The appeals authorized are limited to two classes; one where a certificate has been obtained from some justice of the Supreme Court, and the other where the questions are such as might have been taken up from the highest court of a State. This

case fails to come within either class. Nevertheless, the trustee claims that in *Pirie v. Chicago Company*, 182 U. S. 438, an appeal was allowed generally under the provisions of the act establishing this court. But the question was not passed on in *Pirie v. Chicago Company*. Indeed, all that is said in reference to it is found at page 440, where, after a statement of the proceedings in the circuit court of appeals, it is added: "The case was then brought here." We have examined the printed record in the Supreme Court, and it appears therefrom that no objection was taken to the appeal, and no issue made about it. The record, also, shows that one question was the recovery of a dividend already paid. The Supreme Court treats, also, of this. This might well be regarded as a substantial matter, involving something more than a mere proof of debt, so that it is not impossible that, if the Supreme Court regarded at all the question of jurisdiction, it rested it on that point. However, it is enough that the issue of jurisdiction was not noticed, and that the effect of the statute is clear.

49 In Freedom Hutchinson, trustee, petitioner, the trustee claims again that, under section 6 of the act establishing this court, there is a general right of appeal as to all matters involving a Federal question, and that the amount at stake is sufficient. This is true, so far as the amount is concerned; and it is true that, if the proceeding in the district court had been in the nature of a strictly issuable controversy, like an intervening petition under the general rules of equity, and if, also, the trustee had taken it to this court by appeal, instead of by a revisory petition, an appeal would probably lie to the Supreme Court. We have several times called attention to this proposition; last of all in Peabody, trustee, petitioner, in which the opinion was passed down by us on July 29, 1902. But while, probably, we might easily be persuaded that the fundamental question was one over which the district court had no jurisdiction except by consent, on the rule of *Bardes v. Hawarden Bank*, 178 U. S. 524, yet the parties did not so treat the case, and, without objection on either side, they proceeded in this court by a revisory petition. Therefore, the only question we have is whether an appeal lies from a determination by us on such a petition.

We must begin with section 23 of the act of July 1, 1898, which provides that the circuit courts shall have jurisdiction of "controversies," "as distinguished from proceedings in bankruptcy." It is not necessary to follow this section further, because what we have cited marks the distinction to which we wish to call attention; that is to say, between "controversies at law or in equity" and "proceedings in bankruptcy." The Supreme Court called attention to this distinction in *The First National Bank of Denver v. Klug*, in which the opinion was passed down on June 2, 1902. Its closing language is as follows: "Apart from section 25," meaning section 25 of the act of July 1, 1898, "the circuit courts of appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings, and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases." The matters in

bankruptcy within this expression are undoubtedly those
50 enumerated in section 2 of the act of July 1, 1898, and referred to several times in *Bardes v. Hawarden Bank*, wherein, still in the line of discrimination, the opinion, at page 536, alludes, also, to questions between the trustee and a stranger to the bankruptcy proceedings. Thus, throughout, a distinction is persistently maintained between "controversies," which alone lay the basis of appeals, and "proceedings in bankruptcy," which are taken up only by revisory petitions.

Coming next to subdivision *a* of section 24 of the act of July 1, 1898, which vests certain jurisdiction in the Supreme Court, it is to be observed that section 25, so far as the Supreme Court is concerned, regulates appeals from orders allowing or rejecting claims. It was, of course, possible that this might have been fairly construed to have limited in all particulars the jurisdiction of the Supreme Court existing when the act of July 1, 1898, was passed; so that section 24, so far as it applies to that court, receives full effect from that point of view. This is illustrated by the fact that in *Boyd v. Glucklich*, 116 Fed. Rep. 131, the circuit court of appeals for the eighth circuit apparently understood that the word controversies, used in section 24, could be construed to include controversies between the bankrupt and his trustee of an issuable character. This section has no relation to appeals from the circuit courts of appeals. Aside from the express provision therein as to the relations of the Supreme Court to courts of bankruptcy not within any organized circuit, and to the supreme court of the District of Columbia, this section did not broaden its jurisdiction in any particular. This seems to be necessarily covered in *The First National Bank of Denver v. Klug*, where an appeal from the district court for the district of Colorado, sitting in bankruptcy, was dismissed, the opinion stating: "Our jurisdiction of this appeal depends on the act of March 3, 1891, by the fifth section of which an appeal or writ of error from or to the circuit or district courts will lie directly 'in any case where the jurisdiction of the court is in issue,' and, in such case, 'the question of jurisdiction alone shall be certified from the court below for decision.'" Therefore, there is no reasonable ground for holding that the Supreme Court has jurisdiction by appeal in this case under section 24*a*.

Coming now to section 24*b*, the basis of the present proceeding:
As it cannot be claimed that there is anything in section 25
which authorizes an appeal to the Supreme Court, and as
51 we have shown that section 24*a* does not authorize one, the only question is whether there is anything elsewhere which helps this application. Like the Supreme Court in *The First National Bank of Denver v. Klug*, we must find this, if it exists, in the act of March 3, 1891. The intent of Congress in this subdivision *b* is emphatic, because, while, ordinarily, appeals take up questions both of law and fact, this subdivision is limited to matter of law. Very likely, the purpose of Congress in this particular was to insure speedy disposition of ordinary questions relating to the administration of an estate in bankruptcy; but, however this may have been, it, by this expression, "matter of law," emphatically distinguished

the proceedings under section 24*b* from all ordinary appeals, where both the facts and the law come up. Section 6 of the act of March 3, 1891, establishing this court, clearly does not permit this appeal, because it is throughout limited to cases which have come to the circuit courts of appeals by appeal or writ of error. As the revisory power in matter of law given the circuit courts of appeals by the act of July 1, 1898, is a peculiar one, specially conferred by that act, it cannot reasonably be held that section 6 of the act establishing this court has any relation thereto. Therefore, the parties having elected to litigate in this court under subdivision *b*, the proceedings terminate here, unless the case is certified to the Supreme Court, either at the option of that court on its requirement, or at our option.

All the indications in the Supreme Court, so far as they touch this topic, are in the direction of the conclusion which we have stated. The trustee relies on an expression in *Bardes v. Hawarden Bank*, 175 U. S. 526, 528, where, referring to the appellate jurisdiction under the act establishing this court, the opinion said that the bankruptcy act had made no change; but that is clearly limited to the question whether the act of July 1, 1898, had made a change as to the power of the district court to certify the question of jurisdiction before a final judgment has been entered. It clearly has no relation
52 to the question before us, either directly or by any possible inference. *Huntington v. Saunders*, 163 U. S. 319, which will be referred to in another connection, is not in point with reference to this particular topic, because it arose under a statute which, in view of the construction constantly given by the Supreme Court to the act establishing this court, brought the case here by an appeal from the circuit court. It was, therefore, clearly within section 6, already referred to.

On the other hand, the opinion in *The First National Bank of Denver v. Klug* contained the following: "The decisions of those courts," meaning the circuit courts of appeals, "might be reviewed here on *certiorari*, or in certain cases by appeal, under section 6 of the act of 1891." Reference is there made to several cases, among them, *Mueller v. Nugent*, 184 U. S. 1. That controversy, as appears at page 7, was brought into the circuit court of appeals by a revisory petition, under paragraph *b* of section 24, precisely like that now before us. It was brought into the Supreme Court by a writ of *certiorari*, issued by that court; and this reference, therefore, supports the theory that cases of the class at bar should be brought to the Supreme Court in that way, and not by appeal, although it must be admitted that this expression in *The First National Bank of Denver v. Klug* is a *dictum*. In *Bryan v. Burnheimer*, 181 U. S. 188, the proceedings and practice were the same as in *Mueller v. Nugent*, already referred to. Nothing can be found from the Supreme Court of an authoritative character which will contravene the construction which settled rules require us to place on the sections of the act of July 1, 1898, to which we have referred, or which would justify us in sending forward this case on appeal.

This conclusion does not leave the parties without relief when the controversy is of such an important or doubtful character that it

ought to receive the consideration of the highest tribunal; because the construction which *The First National Bank of Denver v. Klug* suggests may be put on section 25*d* with reference to certification and writs of *certiorari*, as between the Supreme Court and the circuit courts of appeals, makes it applicable to bankruptcy proceedings, no matter in what way they get into the circuit courts of appeals, and whether they come up under section 24 or section 25; and this is clearly a just construction of that section.

53

This leaves us only the application for leave to appeal to the Supreme Court made by the bankrupt in *Heman Osborne, petitioner*. This is also a revisory petition, and, therefore, it is disposed of by what we have said with reference to Freedom Hutchinson, trustee, petitioner. There may be a further difficulty, however, which we ought not to fail to explain. In *Huntington v. Saunders*, 163 U. S. 319, already referred to, an appeal by a creditor against a discharge which had been granted was dismissed on the ground that the case involved only "a speculation on the possibility that, if the discharge were refused, something might be made out of the bankrupt," and that, therefore, the appeal did not meet the requirement that, under section 6 of the act of March 3, 1891, the matter in controversy must exceed $1,000 beside costs. This is not directly in point, because it was an appeal by a creditor, while at bar the bankrupt seeks to appeal. Yet, in view of the general rule applicable to that topic, as stated in *Smith v. Adams*, 130 U. S. 175, 176, *Washington Railroad Company v. District of Columbia*, 146 U. S. 227, 231, 232, *South Carolina v. Seymour*, 153 U. S. 353, 357, *Durham v. Seymour*, 161 U. S. 235, and *Hollander v. Feckheimer*, 162 U. S. 326, 328, a serious question arises whether a pecuniary amount is so directly involved here that the condition in that particular, imposed by section 6 of the statute of March 3, 1891, can be met. Nevertheless, we do not find it necessary to determine this, because, as we have already said, this application is fully met otherwise.

We must, however, notice *Audubon v. Shufeldt*, 181 U. S. 575. There an appeal was taken directly to the Supreme Court from an order of the supreme court of the District of Columbia granting a discharge in bankruptcy. We have examined the printed record, and we find that there was no question in the supreme court of the District with reference to the right of appeal; and the case as reported in the Supreme Court of the United States shows that no question was made there. The issue which was discussed in each court was not as to the right to a discharge, but as to its effect; *Audubon v. Shufeldt*, at page 577, states it thus: "But the question now before us is" "whether the bankrupt was entitled to a discharge from the arrears of alimony due to his former wife." Thus, the question which the Supreme Court passed on was not simply the right of discharge, which was purely a "proceeding in bankruptcy," but its effect, which ordinarily arises after a discharge is granted, and makes an issuable controversy between adverse parties. However, in view of the later case of *The First National Bank of Denver v. Klug*, to which we have referred, it must be said either that *Audubon v. Shufeldt* did not consider the question of the right

54

of an appeal to the Supreme Court, or that that court found something peculiar with reference to appeals from the supreme court of the District, or that the earlier case has been overruled.

In conclusion, we are of the opinion that neither application should be granted. If we are in error, there is ample remedy by writ of mandamus from the Supreme Court. Whatever doubts may remain, we are clearly of the opinion that we ought not to load up the Supreme Court with appeals of the character now under consideration until that court has determined that parties are entitled to take them.

In each case there will be the following order:

The application for an appeal to the Supreme Court is denied.

55 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

FREEDOM HUTCHINSON, Trustee, Appellant,
v.
OTIS, WILCOX & COMPANY, Creditors, Appellees. } No. 415.

Order of Court.

September 4, 1902.

Whereas leave was granted on May 29, 1902, to the appellant to file petition for appeal, assignment of errors and requests for special findings on or before Monday next, June 2, 1902, and a brief in support thereof within one week thereafter, and whereas briefs upon the question of the right of the appellant to appeal were filed by the appellee on June 7, and by the appellant on June 9, 1902,—

Upon consideration thereof, it is now to wit, September 4, 1902, ordered upon the application of the appellant for an appeal to the Supreme Court of the United States, as follows: The application for an appeal to the Supreme Court is denied.

By the court,

JOHN G. STETSON, *Clerk.*

56 United States Circuit Court of Appeals for the First Circuit, October Term, 1902.

FREEDOM HUTCHINSON, Trustee, Appellant,
v.
OTIS, WILCOX & COMPANY, Creditors, Appellees. } No. 415.

MEMORANDUM.—On October 17, 1902, Freedom Hutchinson, trustee, the appellant herein, presented in court a petition for leave to file in the district court a petition for an amendment of agreed facts and for a rehearing on the same, and leave was granted to file said petition. Briefs on said petition were submitted by both parties, and on November 21, 1902, said petition was denied. By direction

of the appellant said petition and the order of court denying the petition are omitted from this appeal record.

JOHN G. STETSON, *Clerk.*

Order of Court.

December 4, 1902.

Whereas leave was granted on May 29, 1902, to the appellant to file a motion to reopen the decree of this court entered on May 22, 1902, and whereas a motion was filed accordingly on said May 29, 1902,—

Upon consideration thereof, it is now, to wit, December 4, 1902, ordered that the motion of the appellant to reopen the decree filed May 29, 1902, be and the same is denied.

By the court,

JOHN G. STETSON, *Clerk.*

57 MEMORANDUM.—On December 4, 1902, motion of appellees for mandate and motion of appellant for stay of mandate were presented in court and filed, and consideration of said motions was postponed. By direction of the appellant said motions are omitted from this appeal record.

JOHN G. STETSON, *Clerk.*

Allowance of Appeal.

(Received in clerk's office and filed January 21, 1903.)

The appeal is allowed under bank. act, § 25 *b*, 1, and rule 36, 2.

O. W. HOLMES,
Assoc. Justice, U. S. Supreme Court.

January 20, 1903.

Findings of Facts by the Court.

(Filed in circuit court of appeals as of May 22, 1903.)

On December 27, 1899, E. C. Hodges & Company made a voluntary assignment to George C. Dickson for the benefit of their creditors. At that time said Hodges & Company were indebted to Otis, Wilcox & Company, of Chicago, in the sum of $4421.66, which indebtedness is still unpaid unless it was discharged through
58 the proceedings hereinafter mentioned against Post & Flagg and Alfred L. Baker & Company. Post & Flagg, of New York city, were indebted to said Hodges & Company in the sum of $4558.57, and Alfred L. Baker & Company, of Chicago, were indebted to Hodges & Company slightly in excess of the sum of $700. On said twenty-seventh day of December, said Otis, Wilcox & Company, knowing of said assignment, brought suit in New York against said Hodges & Company, as non-residents on said indebtedness, and by

an order of the court obtained a warrant of attachment on all effects and credits of Hodges & Company in the hands of Post & Flagg. Said warrant of attachment was duly served on Post & Flagg. McIntyre & Wardwell, who were creditors of Hodges & Company in the amount of $34,000 and upwards, brought a similar suit in New York against Hodges & Company and made a similar attachment of the funds in the hands of Post & Flagg. The petitioners also at about the same time brought suit in Chicago against E. C. Hodges & Company on account of the same indebtedness, and joined Alfred L. Baker & Company of Chicago as garnishees. At the date of the attachments in said suits, E. C. Hodges & Company were insolvent and remained so until the time of their adjudication in bankruptcy on the twenty-seventh day of April, 1900. The defendant Hodges & Company duly appeared by attorney in both said suits prior to the filing of the petition in bankruptcy hereinafter mentioned.

On April 6, 1900, a petition in bankruptcy was filed in the United States district court for the district of Massachusetts by two members of the firm of E. C. Hodges & Company, and the firm was thereafter, on the twenty-seventh day of said April, adjudicated bankrupt, and Freedom Hutchinson was duly appointed trustee of the estate of said E. C. Hodges & Company on the twenty-third day of May, 1900.

That, after the appointment of said Hutchinson as such trustee, he wrote Post & Flagg notifying them of his appointment and demanding payment from them of the amount due the estate of E. C. Hodges & Company, and received from Post & Flagg in answer to said notice and demand a letter dated May 29, 1900, of which the following is a true copy:

59 NEW YORK, *May* 29, 1900.

Replying to your favor of the 28th inst., enclosing copy of your appointment as trustee in bankruptcy of the estate of E. C. Hodges & Company, and requesting us to forward you check for the amount due by us to that firm, according to our last statement, we beg to say that the amount mentioned in your letter is a correct statement of what we owe to the said firm of E. C. Hodges & Company, but the same has been attached in two suits brought in the supreme court of the State of New York, one by the members of the firm of McIntyre & Wardwell, to recover the sum of $32,436.64, with interest from December 28, 1899; in which suit an attachment was served upon us on or about the twenty-eighth day of December, 1899; the other, in a suit brought by Joseph E. Otis, Jr., and Charles H. Wilcox, to recover the sum of $4312.50, in which suit a warrant of attachment was levied upon us on or about the same day, viz.,— December 28, 1899. The proceedings in these actions are, we believe, still pending undetermined; at all events, the attachments against the funds in our hands have never been released and we are therefore unable to comply with your request.

Very truly yours, POST & FLAGG,
By H. T. HAND, *Att'y*.

The trustee also notified Alfred L. Baker & Company of his appointment as trustee, and demanded payment of the amount due from them to the estate of said Hodges & Company, and received in answer to his notice and demand a letter dated June 4, 1900, of which the following is a true copy:

CHICAGO, *June* 4, 1900.

Your favor received. In reply thereto, we desire to inform you that a notice from Otis, Wilcox & Co. was served on us, that they had a claim against the bankrupt referred to in your letter, which ties up whatever is due from us until the claim is settled.

Yours truly, ALFRED L. BAKER & CO.

The trustee did not intervene in either of said suits. In neither suit was any defence interposed nor was said adjudication in bankruptcy pleaded or suggested on the record. The cases went to judgment against the principal defendants by default, and executions were issued thereon.

60 That Post & Flagg, although notified prior to the judgment in said New York suit against said Hodges & Company of their bankruptcy and the claim of the trustee to the funds in the hands of said Post & Flagg, on demand from the sheriff paid over to the sheriff on the execution the sum of $4558.57 as and for the effects and credits of the principal defendants in their hands and covered by said warrant of attachment. Said payment was made on the nineteenth day of June, 1900. That soon thereafter A. L. Baker & Company, similarly informed, and allowing themselves to be charged as garnishees by default in the Chicago court, paid over on execution duly issued on the judgment against said Hodges & Company the sum of $293.82, which money paid by Post & Flagg and A. L. Baker & Company was transmitted to Otis, Wilcox & Company, who received it in the belief that it had been duly recovered under valid attachments and that there had thus been effected a full settlement of the judgment rendered on the account of Otis, Wilcox & Company, against said Hodges & Company, an itemized statement of which account is annexed to the proof attached to the petition of Otis, Wilcox & Company, in this case.

And Otis, Wilcox & Company, received the same knowing of the pendency of the bankruptcy proceedings of Hodges & Company, and the claim of the trustee that Post & Flagg were liable to pay said debt to him.

That the court records in said New York and Chicago suits taken together show a judgment issued on the account annexed to the petitioner's proof of claim, and that the same is fully paid and satisfied of record, and that such payment and satisfaction resulted solely from said $4558.57 paid on execution by Post & Flagg, and said $293.82 paid on execution by A. L. Baker & Company, as aforesaid.

Before said payments were made by Post & Flagg and A. L. Baker & Company, Otis, Wilcox & Company, had agreed with them to save them harmless from any liability to any other party for said money so paid or any part of it.

That prior to said adjudication in bankruptcy E. C. Hodges was

a member of the New York stock exchange, an unincorporated association, whose rules regulating the transfer of membership provide as follows:

61 Constitution, Article XIII, sect. 6.

All contracts, debts or obligations of every description, with, or to, members of the exchange, of a member who agrees to transfer his membership, shall become due and payable when notice of said agreement to transfer is posted upon the bulletin of the exchange, and shall be liquidated, and paid, as allowed by the committee on admissions, out of the proceeds of said membership, upon consummation of the transfer thereof. This law shall also apply in every case where a membership is transferred by the committee on admissions.

Constitution, Article XIV, sect. 6.

Any creditor failing to file with the secretary of the committee on admissions a written statement of his claim against a member, prior to the transfer of membership of such member, shall forfeit all right to a share of the proceeds of such membership until all claims filed prior to such transfer have been paid in full.

Otis, Wilcox & Company, and McIntyre & Wardwell were members of said exchange.

That on or about the twenty-third day of July, 1900, the membership or "seat" formerly owned by E. C. Hodges in said New York stock exchange was, on the application of the trustee in bankruptcy, duly sold through the proper officers of said exchange, under the rules, for the sum of thirty-nine thousand (39,000) dollars.

That at the time of the sale of said "seat," and prior to the paying over of any of the proceeds thereof, all stock exchange creditors of said Hodges & Company, including Otis, Wilcox & Company, were duly notified of a time fixed for proof of claims against said E. C. Hodges. The form of said notice was as follows:

New York Stock Exchange.

NEW YORK, *Aug.* 23, 1900.

.....

You are requested to appear before the committee on admissions,
on Thursday,..... ..... at 12 o'clock m.,
to substantiate your claim against

.....

Respectfully,

.....

Secretary of Committee.

62 Agreeably to a resolution passed by the committee, claimants will be required to exhibit in person, a transcript of their books, in substantiation of their claims.

That on receipt of notice of said time and place for such proof, Otis, Wilcox & Company wrote and mailed to the secretary of the New York stock exchange a letter, which was received by him, of which the following is a true copy:

CHICAGO, *Aug.* 25, 1900.

I am in receipt of your favor of the 23rd requesting my appearance before the committee on admissions on Thursday, the 30th, at twelve o'clock, to substantiate our claim against E. C. Hodges.

With regard to this claim we wish to say that we have made a settlement and relinquish whatever claim we had against Mr. Hodges' membership. Kindly communicate the above to committee on admissions and oblige,

Yours very truly, J. E. OTIS, JR.

The "settlement" mentioned in said letter was the settlement which Otis, Wilcox & Company, believed had been effected by said payments by Post & Flagg and A. L. Baker & Company on said executions.

63 That after the expiration of the time allowed for making proofs of claims as above stated against said "seat," and after satisfying all claims so proved and commissions for selling and dues to the exchange, the proper officers of said exchange paid over to said trustee Hutchinson $4091.28 as the balance belonging to said Hodges's estate, and not required for the payment of claims proved against the Hodges "seat" in said New York stock exchange.

Otis, Wilcox & Company, did not appear before said committee on admissions pursuant to said notice, and did not present their said claim against E. C. Hodges & Company to said committee for allowance, for the sole reason that they believed that said claim had been paid by said payments by Post & Flagg and A. L. Baker & Company on execution. On April 4, 1901, they applied to said committee for an allowance *nunc pro tunc* of their said claim, but the committee ruled that the application could not be entertained.

The trustee, on or about January 7, 1901, instituted suit in New York city against Post & Flagg to recover from them the debt due E. C. Hodges & Company at the time of the institution of the proceedings in bankruptcy, and the trustee proposed to bring similar proceedings against said Chicago garnishees, A. L. Baker & Company, the claim of the trustee being that the adjudication in bankruptcy dissolved the said attachments and that said Post & Flagg and A. L. Baker & Company were thereafter accountable to him as trustee in bankruptcy. On January 14, 1901, the New York attorneys of Otis, Wilcox & Company, learned of said suit and assumed its defence under said agreement by Otis, Wilcox & Company, to save harmless Post & Flagg. They at once notified the Chicago attorneys of Otis, Wilcox & Company, and the Chicago attorneys at once placed the matter in the hands of Messrs. Ropes, Gray & Gorham, of Boston, by letter received February 1, 1901. Mr. Gorham on March 9, 1901, filed the petition of Otis, Wilcox & Company.

64 Facts were subsequently agreed to, and the trustee and Mr. Gorham further agreed that the trustee's suit against Post & Flagg

and his claim against A. L. Baker & Company should be settled by the immediate payment by Otis, Wilcox & Company, of the moneys due from Post & Flagg and from A. L. Baker & Company to the trustee, with interest and costs. Thereupon Mr. Gorham wrote to Chicago for the funds with which to make the payment. On April 29 the funds were received and paid to the trustee, as follows:—

Total paid		$5,196 07
Made up as follows:		
Post & Flagg, debt to bankrupts	$4,558 57	
Interest thereon from date of the trustee's demand to April 29, 1901	250 72	
Costs of trustee's New York suit against Post & Flagg	76 80	
A. L. Baker & Co., debt to bankrupts	293 82	
Interest thereon from date of the trustee's demand to April 29, 1901	16 16	
		$5,196 07

and the trustee received and applied the same in full settlement of the suit against Post & Flagg and the claim against A. L. Baker & Company.

The court records in the New York suit brought by Otis, Wilcox & Company, above referred to, were made in conformity to the following New York statute, viz:

"Where an execution is returned wholly or partly satisfied, the clerk must make entry of the satisfcation or partial satisfaction, in the docket of the judgment upon which it was issued. Thereupon the judgment is deemed satisfied to the extent of the amount returned as collected, unless the return is vacated by the court."

65 New York Code of Civil Procedure, section 1264.

The trustee has in his hands and possession, funds of the estate to an amount sufficient to pay the claim of Otis, Wilcox & Company.

Conclusions of Law.

(Filed in circuit court of appeals as of May 22, 1902.)

Upon the foregoing facts, this court makes the following conclusions of law:—

First. That the appellees' proof of claim should be allowed in manner and form as set forth in the decree of the district court.

Second. That the substituted proof of claim presented by the appellees was properly allowed by the district court.

Third. That the part of the decree of the district court, ordering that the trustee should pay to the appellees, Otis, Wilcox & Company, the sum of $4,091.28 on account of their claim, is not subject

to an appeal to the circuit court of appeals, and is not open for revision by that court on the appeal taken by the trustee from the allowance of the claim.

Order of Court.

February 20, 1903.

Ordered: The foregoing finding of facts by the United States circuit court of appeals for the first circuit and its conclusions of law thereon, stated separately are hereby made and filed as of May 22, 1902, before the time of entering its decree of that date.

By the court,

JOHN G. STETSON, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

To Otis, Wilcox & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the United States circuit court of appeals for the first circuit, wherein Freedom Hutchinson, trustee, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, associate justice of the Supreme Court of the United States, this 20th day of January, in the year of our Lord one thousand nine hundred and three.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

67 JANUARY 23RD, 1903.

Service of the within citation is hereby accepted.

ROPES, GRAY & GORHAM,
JOHN C. GRAY,
Attorneys for Otis, Wilcox & Co.

68 *Certificate of Clerk of Circuit Court of Appeals.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1902.

FREEDOM HUTCHINSON, Trustee,
v.
OTIS, WILCOX & COMPANY, Creditors. } No. 415.

Clerk's Certificate.

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that the printed and typewritten pages, hereto prefixed, numbered 1 to 65, inclusive, contain and are a true copy of the record and all proceedings in the cause entitled,

FREEDOM HUTCHINSON, Trustee,
v.
OTIS, WILCOX & COMPANY, Creditors. } No. 415.

in said United States circuit court of appeals determined, and that thereto annexed, as pages numbered 66 and 67, is the original citation issued upon the appeal of said Freedom Hutchinson, trustee, to the Supreme Court of the United States.

In testimony whereof, I hereunto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston, in said first circuit, this twenty-eighth day of February, A. D. 1903.

{ Seal United States Circuit Court of Appeals, First Circuit. }

JOHN G. STETSON, *Clerk.*

Endorsed on cover: File No. 18,862. U. S. C. C. of appeals, 1st circuit. Term No. 634. Freedom Hutchinson, trustee, appellant, vs. Otis, Wilcox & Company. Filed March 13", 1903.